JOURNAL

OF THE

SOCIETY OF COMPARATIVE LEGISLATION.

EDITED FOR THE SOCIETY BY

SIR JOHN MACDONELL, C.B., LL.D.

AND

EDWARD MANSON, Esq.

"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ'ὀρθῶς ἔχον ὀφθῃ καὶ τὸ χρήσιμον."—Arist. *Pol.* II. 1.

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Rudolph von Jhering.

RUDOLPH VON JHERING.

THE portrait in this number of the Journal is that of Rudolph von Jhering. Only one of his works, and that by no means the chief (*Der Kampf ums Recht*), has, so far as I know, been translated into English. But he has exercised in Germany and on the Continent generally, and, it may be added, in America, influence comparable to that of Savigny. Here too his teaching has percolated into the writings of those who scarcely know his name. Some sixteen years have passed since his death, and about sixty since the first volume of his chief work appeared. He is still a fountain of instruction, an impulse to research and progress. Asked what law book in modern times had opened new pathways, the English lawyer would answer "Maine's *Ancient Law*." The answer of many continental lawyers would be "Jhering's *Geist des römischen Rechts*," the first volume of which appeared some years before the *Ancient Law*. Probably no law books since Blackstone's Commentaries have passed through so many editions as some of Jhering's works. Few, if any, have influenced so much both lawyers and laymen. His incisive speech, his luminous exposition of jurisprudence, his constant recognition of its relation to ethics, make Jhering a writer by himself among moderns; though with traits not unlike those visible in *L'Esprit des Lois*. I am not competent to pass judgment on the merits of his *Geist des römischen Rechts* as a contribution to the technical investigation of Roman law. But no one can study it without feeling that he has obtained light and insight. Much of Jhering's work was for a purpose which is now fulfilled. He laboured hard to dig the grave of the jurists who lived in a world of shadowy abstractions, the "Romanists" and fanatical civilians who stuck to their texts and shrank from contact with the realities of to-day. I am not sure that he did not entomb some of his best work in the grave which he dug for others. "Through Roman law, but beyond it," had much more point before than after the Civil Code. But some of his books (especially *Der Zweck im Recht*) are among the few in which the trained jurist and the philosophic thinker fraternise; in which the larger aspects of law are viewed by one whose technical knowledge is great; in which "the philosophy of law" is not the enthronement of platitudes. There are signs that the value of jurisprudence as a science worthy of cultivation will be called in question. Apologists for it will nowhere find richer stores of arguments for its maintenance in the first rank of humanising studies than in the writings of one who was lawyer, moralist, and historian.

J. M.

vast importance to all who have that subject at heart to know what has been done in New Zealand, what has been done in Australia, and what has been done in Germany with regard to this great subject. But I am extremely sceptical as to whether many of those who do endeavour to legislate on that subject are fully conversant with these various systems. And I scarcely know how they could be conversant unless they read the volumes of the Society of Comparative Legislation. Take another case. We observe in the course of this work certain tendencies in legislation as characteristic of certain periods—certain subjects on which both our own empire and other nations seem to be concentrating their attention. For example, during the last two years there have been thirty-three Acts and ordinances dealing with children, 127 Acts and ordinances dealing with crime in all its aspects, and exhibiting clearly the tendency to discriminate between the habitual or professional and the occasional criminal. It seems as if there were a wave of feeling passing over the world with regard to particular subjects which sweeps legislation along with it. Moreover, with regard to subjects which are not imminent or not critical to us, we have the young legislatures in the West and South—in America, Australia, and New Zealand—proceeding to deal with new topics that some day we may also have to deal with, but as to which it is of the greatest value to us to know what they are doing, what they are aiming at, and what success they are achieving in these strange experiments. For example, in the State of Michigan they have prohibited the marriage of epileptics and feeble-minded persons, and in Nebraska the marriage of first cousins. This is a branch of legislation at which many will be inclined to smile now, but which has developed by the new science of which we scarcely know how to pronounce the name—the science of eugenics—one which is greatly taking up the higher minds of the country. We smile at such regulations of marriage now. If the success of the enactment in Michigan is great, if it is found that hereditary incurable defects are thereby checked, that a better and purer race is being produced, a race more competent to people the ideal State which we are always aiming at, are we sure that we shall always smile? Now it seems legislation more worthy of Plato's Republic than of practical Parliaments. But whether that be so or not, we know from the work that is being done in Michigan, or we shall know, whether this has had any effect at all—whether a bad effect or a good effect. These are all the examples that I have time or competence to give you to-day with regard to the work which this Society is doing. In these days, when the State undertakes so much, I venture to say that there are many branches of national expenditure which are not nearly so useful as that involved in the Society in whose name we are assembled to-day. That that is recognised is shown by the fact that some of the Outer Britains—what used to be called the Colonies—are beginning to contribute to our Society as recognising the vast utility of its work. Not merely is it not State-sustained; the whole of the arduous work

contained in these volumes with which you are conversant is done absolutely gratuitously : neither the editor nor the secretary, nor yet the contributors receive any payment whatever for their priceless work. I think therefore that I am entitled to ask you, some even beyond this hall, to give in the future their earnest support to this most useful and beneficent Society.

I have now to go to the House of Lords, and the Lord Chief Justice has kindly consented to take the chair in my absence. I feel a sort of sense of shame at being able to occupy the chair for so short a time ; but I am compelled to go to the House of Lords, and I am not sure that the sooner I vacate the chair, the better it will not be for the Society, as I shall give place to one so much more fitted to occupy it.

The Lord Chief Justice moved a vote of thanks to the Earl of Rosebery for his address.

THE WORK AND PROSPECTS OF THE SOCIETY.[1]

[*Contributed by* Sir Courtenay Ilbert, K.C.S.I.]

This Society has now been in existence for some fourteen and a half years, and the time appears to have arrived at which we may, with advantage, review our position and consider how far we have justified our existence. What did we endeavour to achieve, what have we succeeded in achieving, what may we reasonably aim at and endeavour to achieve in the future? These are the questions which I should like to submit for your consideration to-day. I want to put some business questions, and deal with them in a businesslike way.

For the establishment of the Society I must admit some degree of responsibility. In a paper which I read at the Imperial Institute, in November 1894, I directed attention to the difficulty then experienced in obtaining satisfactory information about the course of legislation in other parts of the British dominions and in foreign countries, and made some suggestions as to the expediency of taking steps towards devising and organising provision for better information on this important subject. The suggestions attracted attention, and at a meeting which was held in the following month, and at which were present some very distinguished and influential persons—great lawyers, great administrators, agents-general, ambassadors and other representatives of foreign countries—a resolution was passed affirming the expediency of establishing a Society of Comparative Legislation, with the object of promoting knowledge of the course of legislation in different countries, more particularly in the several parts of her Majesty's dominions and in the United States. The resolution was proposed by the late Lord Herschell, then Lord Chancellor, and was seconded by the late Sir Robert Herbert, who had recently been head of the Colonial Office, and was one of the most eminent of our colonial administrators.

This resolution was the origin of our Society. The terms of the resolution, and the title which the Society has assumed, have been made the subject of friendly criticism in a paper contributed to our Journal some years ago by Mr. Jenks. He complained that we had unnecessarily and unduly narrowed our aims, that we ought to have taken for our object,

[1] An address delivered at the annual meeting of the Society, held at the Law Society's Hall, on June 30, 1908.

not comparative legislation, but comparative law, or comparative jurisprudence, and that we had thereby missed, or at least hampered, a great opportunity for advancing the cause of legal study and legal science. There is no one who in recent years has done more excellent service in advancing legal education than Mr. Jenks—no one to whom the society whose hospitality we are enjoying to-day is more deeply indebted for assistance in the efforts it has made to improve the system and methods of legal instruction here in London. Any suggestions or comments from such a quarter are entitled to the greatest weight. But to the criticism which I have mentioned, several answers may be made.

In the first place, our Society was formed to meet a specific and practical need—a need the existence of which had obtained general recognition: the need of obtaining better, fuller, more accurate information about the course of legislation in different parts of the world. It was this need which it was our immediate and primary object to supply.

In the next place, we had before us, as a model, a society which had for several years done most useful work in the direction in which we are endeavouring to move—the French Society of Comparative Legislation; and we were not ashamed to express our appreciation of its methods and objects by the sincere flattery of copying its title.

And, lastly, the title which we have assumed has not, in practice, hampered or limited our work. We have invited addresses, the editors of our Journal have welcomed to its columns contributions, and very valuable contributions, which go beyond our scope as construed in its narrower and stricter sense. "Excusable, but illogical," says our critic. "Justifiable," may we not rather say, "and commendable"? Indeed, to have acted otherwise would have been the silliest pedantry. Had our object been to found a school or faculty of law, other considerations might possibly have applied, though even then we might have been encouraged in the adoption of a similar course by the example of our friends, the London School of Economics and Political Science, who, finding on their border a field unoccupied and uncultivated—and sorely in need of cultivation—have not hesitated to advance into a region which belongs more strictly to another faculty, or rather to anticipate the work of a faculty which, for reasons we all deplore, is as yet a faculty of the future. And I am sure that in so doing they have not been treated as trespassers by our present hosts, the Incorporated Law Society, but welcomed as friends and useful co-operators. So we also have recognised that the study which we undertook has many aspects, and cannot profitably be dissociated from other cognate branches of study. It has one aspect which appeals more directly to the teacher or student of the principles of law, another which appeals rather to the practising and professional lawyer, another which has more attractions for the administrator or legislator. From the scientific point of view the study of comparative legislation, or the comparative study of legislation, whichever

phrase you prefer, may be treated as one of the branches of the comparative study of law; and this again is one of the methods by which the science of law has been and may be studied. There is an admirable essay by Mr. Bryce, in his *Studies of History and Jurisprudence*, in which he describes the four principal methods of legal science: the metaphysical or *a priori* method, the analytic method, the historical method, and the comparative method; points out the close relation between the two latter methods—of which the one may be said to apply to time what the other applies to space—and illustrates the fruitful results which have been obtained by the adoption of these two methods. If you wish to know the real meaning of a law you must trace it to its sources, you must study its historical development, it must be compared and contrasted with other laws which have come into existence at other times, in other countries, and under other conditions; you must inquire how far resemblances are to be explained by affiliation, by imitation, conscious or unconscious, direct or indirect, or by similarity of conditions, and to what causes—historical, racial, climatic, political, social, or economic—differences are due. It is by the application of these methods that the scientific study of law has during the last two or three generations made such gigantic strides. But the comparative study of legislation, if in one sense it is narrower, in another sense is wider than the comparative study of law. It transcends the boundaries of jurisprudence, and trenches on the provinces of political science, of economics, and of sociology. It compares with each other the constitutions of different law-making bodies, their powers, and their procedure. It examines, compares, and contrasts the legislative experiments which have been made or proposed with reference to a particular subject—political, administrative, economical, industrial, fiscal, or other—at different times and in different States, considering not merely the text of the law, but the circumstances out of which it arises, and its practical working. And it applies to institutions the same comparative methods as are applicable to laws.

If, therefore, we had adopted the suggestion of our critic, and described ourselves as a Society of Comparative Law or of Comparative Jurisprudence, we should have run some risk of narrowing instead of widening our scope, and of unduly subordinating the interests of the legislator and the administrator to those of the professor of law or the professional lawyer. What we have endeavoured to do, is to take a broad and liberal view of our work, and to appeal to and enlist the interests of all these classes, knowing, as we do, that the study of law and the study of legislation are intimately and inextricably connected with each other. You cannot understand the common law of a nation or of a country without considering how it has been modified by enactments of the legislature. You cannot understand the enactments of a legislature without knowing the common law on which they are based, and whose principles they presuppose. And the common law of a nation is only one side of the national mind which is reflected in its national institutions.

But perhaps I have detained you too long on a question of title. It matters comparatively little what name we bear. The question that matters is: whether we have succeeded in doing, whether we are in the course of doing, any useful work. I have been looking back over some of our early programmes, and I find that we had a variety of suggestions and proposals before us, and that, as might have been expected, not all of them have borne fruit. Some were too ambitious, some were, for various reasons, impracticable. This was what was to be expected in the case of a new society. We were, we still are, in an experimental stage, feeling our way, and doubtful about the direction in which we may most advantageously move. But on the whole I think we have no reason to be dissatisfied with what we have done, or to feel any discouragement about our prospects in the future.

One of the first things that we proposed to do was to obtain, through a committee formed for the purpose, and by means of communications addressed to the governments of the several British possessions in different parts of the world, information about the existing conditions of their statute law, with special reference to such points as its form, the modes of preparing and passing bills, the revision and amendment of statutes, the form and manner of their publication, the measures taken to secure uniformity of language, consolidation, codification, and indexing. We undertook this work, we sent to the governments of the different parts of the British dominions a number of questions which I am afraid must have given them a great deal of trouble to answer, but which they were most kind and helpful in answering; and by these means we collected a great quantity of useful information, which we published in our Journal, and of which I ventured to take advantage subsequently in a book of my own.

Another thing which we proposed to do was to give some account of the course of legislation throughout the British Empire, and so far as possible in foreign countries. "A difficult and ambitious task," you will say. Yes; both ambitious and difficult; but, thanks to the help of our friends in different parts of the world, and to the zeal and indefatigable labours of the editors of our Journal, and of the colleagues whom they have called to their assistance, we have succeeded in accomplishing it. For every year since 1895 we have brought out in our Journal a summary of current legislation, published as soon as possible after sufficient time had elapsed for collecting, tabulating, digesting, and summarising our materials. We began with the work of the several British legislatures, some sixty in number, and we have extended our survey to the United States, where there are some fifty more legislatures, and also to the continent of Europe. But of course, in dealing with foreign countries, we have, for reasons which will be obvious, found it impossible to make our review as regular, systematic, or complete as in dealing with the legislation of the British Empire.

I doubt whether any one who has not attempted the task can realise

the enormous labour involved in collecting and digesting the great mass of legislative material with which we have had to grapple. I can speak with some small experience, for I have myself summarised the Indian Acts, with the subject-matter of which I happen to have greater familiarity than most persons in this country.

What we desired to do was, not merely to compile a dry list or register of enactments, but to bring out the features of novelty, importance, and general interest in each new law. But in order to do this properly one ought to have some acquaintance with the previous state of the law and the history of legislation and proposed legislation, and with the influences, interests, arguments, and currents of opinion which have been brought to bear on the subject-matter of legislation. And the facts ought to be presented in such a way as not to give rise to charges of partiality, prejudice, or captious criticism. In short, we wanted an army of competent and impartial experts, marshalled and controlled by exceptionally able editors. Of course we have not realised, and we did not expect to realise, our ideals; but we have done what we could with the persons and materials at our disposal, and I believe that we have succeeded in doing a piece of work which experience has proved to be of great practical value, which has been much appreciated throughout the British Empire, and which has reflected the greatest credit on the zeal, energy, and industry of the editors of our Journal and their staff.

This annual summary of legislation, though it has occupied much of the time and labour of the editors of our Journal, and fills much of its space, accounts, after all, for only a comparatively small portion of its contents. Our editors have, as I have already hinted, exercised a wise liberality of judgment in construing the scope of our Society, and have thrown open the columns of our Journal to a wide variety of subjects, all legitimately associated with our undertaking. I had begun to frame a list of the more important articles which have from time to time appeared in the two volumes of our original series, when Mr. Albert Gray was our editor, and in the eight portly volumes which have succeeded under the editorship of Sir John Macdonell and Mr. Edward Manson, but I was compelled to desist, for fear of wearying you. I must refer those who are interested in the subject to the volumes themselves, as evidence that we have not wasted our time or the money of those who have helped us.

So much for the work which we have done. Now let me ask another question: Has the interest in our work abated? Judging by the experience of our Society, I can give a satisfactory answer to that question. The circulation of our Journal has increased, and from every quarter of the world we have received and are continuing to receive expressions and evidence of sympathy and encouragement. But I should like to answer the question also from another point of view—that of one whose business it is to sit at the Table of the House of Commons. I have said that our Society arose

from a recognition of the need of better information about the course of legislation in different parts of the world. Does that need continue? Is it still felt? To these questions there can be but one answer. Every one who has had anything to do with the House of Commons must have been struck by the steady, continuous, growing demand for information of this kind. It reveals itself in the debates of the House, in questions to Ministers, in requests for returns—questions and requests which throw an enormous burden on the departments of the executive government. Take some of the most prominent subjects of the day: licensing, education, the care of children, the treatment of old age. The Government is overwhelmed with requests for information about the laws which are in force or have been proposed on these subjects in the different parts of the British dominions and in other parts of the world.

These requests come not merely from Westminster, but from other parts of the British Empire, and from foreign countries; and the supply of answers to them occupies a great and increasing part of the time of the several departments of the Government. I feel sure that any aid which they could obtain in the performance of this onerous task would receive a most hearty welcome. We have then every encouragement on this ground to continue our work, and to extend it so far as our means will suffice.

There are many directions in which we should like to extend our work. I will mention one or two of them. I have spoken of our annual reviews of legislation. Each of these reviews is accompanied by a full index. We should like to consolidate these indexes so as to supply one general index to the legislation of, say, the last ten or twelve years. The compilation of such an index would be a dry and laborious task, but the index would be extremely useful.

These annual summaries supply useful information about the course of legislation, but they supply only a small part of the information we should like to have. We want to know, not merely what laws have been passed, but how they work, and, in some cases, whether they work at all. We should like to supplement our necessarily meagre annual reviews of legislation by monographs on particular subjects of legislation, showing the laws in force in different countries on the same subject, and how they respectively work in practice. Some valuable monographs of this kind will be found in the volumes of our Journal, and we should like to extend their number largely. But I need hardly remind you how difficult work of this kind is, if it is to be done well, and what an amount of labour and of expert knowledge it involves. These two illustrations—the index and the monographs—of the kind of work we should like to undertake and extend, are taken from the more practical side of our work: that which is concerned with the needs of the legislator, rather than with the scientific study of law. My third illustration shall be of a kind which appeals less to the legislator than to the student. In a recent number of the Journal

a suggestion was made as to the systematic collection of information about primitive laws and customs, more especially those of communities within the British Empire, and in our very last number there is a further paper on this interesting and important subject, inviting concise answers to certain specific questions, and offering to publish these answers in the Journal. The editors are fully aware of the magnitude and difficulty of the task in which they are endeavouring to co-operate, but they think—and I agree with them—that it falls legitimately within the scope of our Society, and that we are fully justified in offering our help in the performance of a task which can only be carried out by systematic and intelligent co-operation from many different quarters. But here again, you will see at a glance that effective co-operation in such a task involves much labour, much organisation, and considerable expense.

These are merely samples of the work which, if we had sufficient means, we might properly and usefully undertake, and of which the results would be embodied in our Journal. And as to the general scope of the Journal itself, what I should like to say about it is this. I should like to make the Journal the recognised organ of those who are engaged in the study either of Comparative Law or of Comparative Legislation, playing the same kind of part as is played for students of history by such organs as the *English Historical Review* and by similar organs in other countries. It ought to contain articles by competent writers on special subjects, and ought also to put its readers on the track of information to be derived from other sources, such as authoritative treatises, blue books, periodicals, and special articles in newspapers, whose correspondents often supply extremely valuable information about the nature and working of foreign and colonial legislation. It appears to me that there is need for such an organ as this, and ample room for it beside the existing organs devoted to legal subjects. This would be the ideal at which I should aim. But to make even an approximation to its attainment would involve much expense, much labour, and careful organisation. What then are the resources on which we can draw, either for money or for expert and literary assistance? How are we off for money and for men?

When we started we were told by many of our friends that the work we contemplated was useful, but that it was difficult and ambitious, that it was of national and even imperial importance, and that we ought to apply for aid from the public funds. But we declined to do so at that stage. We knew that our enterprise was experimental, and we thought it wiser to make a start with the money we had derived from private subscriptions, believing that if experience showed our work to be useful we should get the requisite support. Our policy was to spend our money freely, not distinguishing between capital and income, but bringing out our Journal as frequently and in as good a form as we could afford, and going on until our funds should come to an end. We have feared more than once that our

unds had come to an end, and that we should be compelled to stop. But somehow or other we have managed to tide over our difficulties, and at this moment we have quite a respectable balance at our bank. That we have been able to continue our existence is due partly to the extension in the circulation and sales of our Journal, and partly to the generous help which we have obtained from various quarters, first and foremost from the great society whose hospitality we are enjoying to-day. Among others from whom we have derived assistance, either by direct money contributions or by subscriptions for our Journal, are some of the governments of our self-governing dominions and of our Crown colonies, and the three departments of our own Government which are specially interested in our work: the Foreign Office, the India Office, and the Colonial Office. I am now speaking of money aid only: for invaluable assistance and co-operation in other ways we are deeply indebted to the departments of our own Government, and also to the governments and public authorities of different parts of the British dominions. In fact, without their sympathetic and active help we could not get on at all.

Then I must not omit to mention a welcome and unexpected windfall which has come to us within the last few weeks. When we started we heard many complaints about the difficulty of obtaining in our legal and other libraries copies of foreign and colonial laws and useful text-books containing information about them. I have reason to believe that this deficiency has been to a considerable extent supplied, that our leading libraries are much better equipped with information about the laws of other countries than they were some ten or twelve years ago, and that this improvement is very largely due to the attention directed by our Society to the subject. If this is so, we may claim credit for having done indirectly a very useful piece of work. But we have always cherished hopes of being able some day or other to form—as the French Society of Comparative Legislation, aided by the French Government, has formed—a library specially devoted to Comparative Legislation and Comparative Law. Some of you may have seen an interesting article on this subject—I do not know who the author was—that appeared in *The Times* of last December. To most of us the formation of such a library as this, and its proper housing and care, seemed to be a dream which would have to wait for its realisation until some useful millionaire should come to our help. But we are now able to say that we are in a position to form at least the nucleus of such a library. One of our most active members, Mr. Schuster of Lincoln's Inn, who is well known as the author of an admirable work on the Principles of German Civil Law, an attempt to present the provisions of the great German Civil Code in a form intelligible and useful to English readers, has made a collection of books and periodicals specially bearing on Comparative Law and Comparative Legislation, and has offered to present this collection to our Society, and to make the room in which it is housed, at all

events for the present, available for the use of those who wish to consult its contents. I need hardly say that we have gratefully accepted his generous offer. It enables us to make a practical beginning with that library of the future which will be appropriately housed and cared for when the millionaire of whom I have spoken has appeared. And it justifies us in taking a step which we had always contemplated, but which up to this time it had not been necessary for us to take. We propose to apply to the Board of Trade for a certificate of incorporation under the Companies Act, so as to be equipped with a regular constitution, and to have power to hold property in our corporate name. This will be a sign and symbol that we have passed out of the initiatory and experimental into the permanent stage of our existence.

These then are our financial resources, quite satisfactory as far as they go, and promising of future growth, but not nearly sufficient even for our actual and present work, to say nothing of possible extensions and expansions in the future. We bring out our Journal as often and as regularly as we can afford to do so, but not by any means as often, as regularly, or as punctually as we should wish. You must remember that we have to rely entirely on volunteer and unpaid work. From what I have said you will have formed some notion of the immense amount of labour, time, and trouble involved in collecting, digesting, summarising, arranging, printing, and publishing these annual summaries of legislation. And many of the articles which have appeared in our Journal represent hard, honest, conscientious labour. But our editors, and, with a few and unimportant exceptions, our contributors, are unpaid. Their work is gratuitously given, and it is supplied by men who are inspired by the belief that the work in which they are engaged is useful work, that it is worth doing for its own sake, and that it ought to be done somehow. I am sure you will agree with me that it is work which deserves payment, and which ought to be properly and adequately paid. Therefore I shall not consider that we are in a satisfactory financial position until we are able to give proper and regular remuneration to our editors and to their staff of contributors and fellow-workers. Payment will be better for them, better for us, and better for the work in which we are interested, and in which they are engaged. You cannot look a gift horse in the mouth, and you naturally feel some difficulty in criticising too severely the quality of work which is gratuitously given, or in pressing too hard or too often for its punctual supply. We are all business men here, and we know that good payment is an essential condition of good business.

This is what I have to say about money ; and I am afraid it comes to the usual thing : that we want a great deal more money for our actual work, and still more for the work which we desire and hope to do in the future.

Now let me pass from money to men. In what quarters ought we to look for co-operation in our work? Our Journal, which is the main visible outcome of our existence, does not appeal to what is called the "general

reader." I don't suppose any one would take up the Journal of Comparative Legislation for the purpose of passing away an idle hour on a summer day. Our organ is of a more serious character. It is intended for a special, though I believe a numerous and growing class, and its pages must be filled by specialists. Now a journal of this kind must have a background from which to draw its staff of contributors. It ought to have a background of men whose special business it is to get up the subjects with which the Journal is concerned, who are normally engaged in studying them, lecturing upon them, or writing about them. Such men are often glad to have an organ by means of which they can give greater publicity to, and obtain wider criticism upon, their views, their speculations, and the results of their studies and researches. They are the natural feeders of a special journal.

What kind of a background have we? We have of course the legal profession. It may be said that the questions in which we are interested lie outside the ordinary range of the professional lawyer's work. That is true to a certain extent, though not so true as would at first sight appear, and it tends to become increasingly less true. It used to be said that one of the reasons why a German lawyer was compelled to familiarise himself with the comparative study of law was that he lived in the midst of a number of different laws, jostling and contending with each other. Unified and insular as English law is, yet there are many points at which it comes into contact with other systems of law and with which the practising lawyer has to deal. British trade is so world-wide, and mercantile law is so cosmopolitan, that some acquaintance with foreign rules of law is indispensable to any one who aspires to be a competent mercantile lawyer. Legal puzzles are always arising out of conflicts of law on the subjects of marriage, succession, and inheritance. And almost all the laws and customs of the world, civilised and uncivilised, come up for discussion in that dingy little room where the Judicial Committee of the Privy Council hold their sittings.

Then again, to take another aspect of the subject, the great field of administrative law is daily presenting more opportunities for practising lawyers. A good many years have elapsed since I had chambers at Lincoln's Inn, but, so far as I can judge from the law reports, the cases which occupy most of the time of the law courts, except perhaps libel cases, are those arising out of the construction and operation of statutes, mainly on subjects of public administration, laws of public health, laws of local government, and the like. Some people say that this is because our statutes are so abominably drafted as to be unintelligible without the assistance of the courts. I am always hearing remarks to that effect from the noble lord who represents East Marylebone in the House of Commons, and who, in the most unselfish spirit, consistently and persistently denounces a system reprehensible in itself, though incidentally lucrative to the profession which he adorns. His criticisms always appear to me to be exaggerated; partly, perhaps, because I am an old draftsman myself.

Our statute book has many defects, and for any assistance which the House of Commons may afford in removing these defects, and in making the task of the administrator and the draftsman easier in the future by furthering the process of expurgation and consolidation, the Statute Law Committee, of which I have the honour to be chairman, will be most sincerely grateful. But it has been my business to study the statute books of a good many countries besides our own, and the conclusion to which I have come is that our statute book comes very well out of the comparison between them. The truth is that, however skilfully our statutes may be framed, the number and complexity of the laws on public administration, a number and complexity which are due, not to any vice of democracy, but to the exigencies of modern civilisation, will always supply legitimate problems for the lawyer and the judge, and the field of administrative law tends to become more and more fruitful to the practising lawyer. The bearing of this remark is that any lawyer who has to study and practise administrative law finds himself naturally attracted to the consideration of those legislative and administrative problems with which our legislators are concerned, and for the solution of which, as we have seen, the comparative study of other systems of law and administration is found to be in an increasing degree needful.

We have then the great body of professional lawyers as a background. I include among them, of course, those who are engaged, either wholly or in combination with their professional practice, in the teaching of the law, as professors and lecturers in our different Universities and schools of law, and whose business it is to prepare lectures and notes of the kind which would be interesting and valuable to readers of our Journal. The United States of America, which are better equipped with schools of law than this country, produce several legal or semi-legal journals and periodicals, some of them of very high quality. Besides such purely legal organs as the *Harvard Law Review*, which is supported by the famous Harvard Law School, and occupies a position corresponding somewhat to that of our own excellent *Law Quarterly*, there are organs of political science, in which public and administrative law plays a large part, and to the study of which much time is devoted in the American Universities. The *New York Political Science Quarterly* is of long standing, and there has recently come into existence a new and promising society, called the American Political Science Association, with its headquarters at Baltimore, the home of the Johns Hopkins University, and having as its organ the *American Political Social Review*. I observe that its board of editors represents seven of the leading American Universities. Organs of this kind deal with legislative questions like those with which our own Society is concerned, and we ought to be able to derive substantial support from classes of persons corresponding to those who contribute to and support the American journals. Indeed we already do so. One of our editors, Sir John Macdonell, is a Professor in the University of London, and has recently been delivering a course of lectures on the laws

affecting labour; whilst the other, Mr. Edward Manson, has, I am glad to see, been within the last few weeks appointed a member of the Board of Governors of the London School of Economics and Political Science, which makes a special study of, and gives valuable courses of lectures on, public administration and administrative law. I have no doubt that he will succeed in enlisting the active interest and co-operation of that flourishing school in the work of our Society and of our Journal.

There is another class from whom we derive assistance, and may hope to derive more: the class of Civil servants, many of whom are trained lawyers. I have referred to the great demand which exists, in Parliament and elsewhere, for information about the laws and institutions of other countries, and to the burden which this demand imposes on the Government departments. If you were to dive into the recesses of the Home Office, the Colonial Office, the Board of Trade, the Treasury, or the Local Government Board, you would find able secretaries and clerks busily engaged in collecting and compiling, for the use of their Parliamentary chiefs, information of the very kind which it is the object of this Society to collect and supply, and I am speaking from personal knowledge when I say that the official archives contain most valuable memoranda on the subjects with which we are specially concerned. I have often asked myself whether there is not room for a good deal of useful co-operation between the Government departments and ourselves, in the collection, compilation, publication, and utilisation of these materials—whether we could not help them, and whether they could not help us. We have always been in very friendly relations with the Government departments, and have obtained valuable help from them in many ways; and we have quite recently attached ourselves more closely to the Colonial Office, who have kindly placed one of their rooms at our disposal for meetings of our Executive Committee. I do not suggest, and I do not think it would be desirable, that we should in any way compromise our distinctive character, sacrifice our independence, or merge our individuality in the Colonial Office, or in any other department of the Government; but it appears to me that there are various modes in which, without running any risk of that kind, we might give and receive help. At all events, I throw out this suggestion for the consideration of those who are officially working on the same lines as ourselves.

I hope I have said enough to convince you that we are engaged in important and useful work, and that we have every prospect of being able to extend and improve that work.

I should like to conclude by saying a very few words suggested by the summaries of current legislation to which I have referred. Any one who glances through these summaries and is able to detach his mind from their arid details and concentrate it on their general features cannot fail to be struck with one thing. He will observe that we, the great civilised nations of the world, are all busily engaged, under different conditions and by different

methods, in pursuing objects which are similar and often identical. We are all attempting, with imperfect vision and with stumbling steps, to advance, so far as it can be advanced by legislation and administration, the cause of humanity and civilisation, to make our laws more intelligible and more rational, to make better provision for those who are unable to help themselves. We have all much to learn from each other, from our experiments, from our failures, from our successes. That is one lesson to be derived from this survey of legislation. There is another. The more we know about each other, the more, especially, that we direct our attention to those aims and objects which unite instead of dividing mankind, the more we endeavour to understand, appreciate, and sympathise with the common work in which we are all engaged, the less are we likely to be influenced by those suspicions and prejudices, bred of ignorance, which are the most fertile causes of discord and of war. The knowledge which it is the object of this Society to provide and to organise makes for progress, and makes for peace. It is the supply and organisation of that knowledge that we are asking you to help.

THE GREAT JURISTS OF THE WORLD.

IX.—CORNELIUS VAN BYNKERSHOEK.

[*Contributed by* COLEMAN PHILLIPSON, ESQ., *Barrister-at-Law.*]

CORNELIUS VAN BYNKERSHOEK, the son of a merchant, was born at Middleburg in Zealand, May 29, 1673. He was educated at the University of Franeker, in Friesland, where he first studied the humanities and then the Roman law. His university career was a distinguished one; and he received the highest eulogy from the celebrated professor Huberus. Afterwards he settled at The Hague, became an advocate, began the preparation of a work on Dutch municipal law, *Corpus juris Hollandici et Zelandici*, and published various dissertations on Roman law. In 1702 appeared a study on the *L.* ἀξίωσις ix. *ff. de L. Rhodia de jactu*, immediately followed by his well-known *De Dominio Maris*, a work on the sovereignty of the sea, dealing with many important matters which had during the two preceding centuries aroused great controversy. Like Grotius, he did not remain at the bar. In 1703 he was appointed a judge of the Supreme Court of Holland, Zealand, and West Friesland, which sat at The Hague, and in 1724 became the President of that Court. His duties gave him an insight into the nature and customs of interstatal diplomatic relationships and a thorough knowledge of the usages and practical details of maritime international law. In 1721 he published his work on the rights and duties of ambassadors, *De foro legatorum*, and in 1737 *Quæstiones juris publici*, of which the first part, *De rebus bellicis*, considers the most vital questions relating to the international laws and customs of war. He died April 16, 1743.

An unfinished work, *Quæstiones juris privati*, appeared after his death. His various writings, which had attracted a good deal of attention, and had already begun to exercise much influence on the legal and political thought of the time, were collected by Vicat, the Professor of Jurisprudence at Lausanne, and published in 1761 at Geneva, in two folio volumes. The contents of these are as follows: Vol. i.—(1) *Observationes juris Romani*, in eight books, matters of Roman law, some considered from a novel standpoint; (2) *Opuscula varii argumenti*, six dissertations on Roman jurisprudence, *e.g.* on *de origine juris*, on *patria potestas*, etc.; (3) Reply to certain criticisms of the preceding. Vol. ii.—(1) *Opera minora*, six dissertations, of which the fifth is *De Dominio Maris*, and the sixth *De*

foro legatorum; (2) *Quæstiones juris publici:* (*a*) *De rebus bellicis*, (*b*) *De rebus varii argumenti*, considering a variety of subjects relative to the law of nations and to Dutch law—*e.g.* c. iii. to c. xii. on legal position of ambassadors, c. xxi. salute to ships of war at sea; (3) *Quæstiones juris privati*, in forty-eight chapters, divided into four books—questions of civil law and Dutch municipal law, and also of insurance and other matters of maritime and commercial law.

In addition to these published treatises, he wrote also two other works, the *Corpus juris Hollandici et Zelandici*, and *Observationes tumultuariæ*, notes on the cases which had come before him in the course of his judicial work; but, in accordance with his will, these writings were never published.

The work of Bynkershoek entitles him to a very high place among international jurists. Indeed, Hall[1] says he "was the earliest writer of real importance, and few of his successors have equalled him in sense or insight." His range of subjects was not so wide as that of Grotius, Puffendorf, Wolf, or Vattel, for his intention was not to produce a systematic work on the law of nations. But the matters he took up for examination are treated more fully, more thoroughly, with stricter logic, and with more practical wisdom than had ever been done before. By his long professional life he had acquired a habit of concise statement, terse expression, exact analysis of complex problems, clearness of explanation, mastery over details, and, generally, an attitude of impartiality in the consideration of conflicting claims. On more than one occasion he gives a deliberate opinion, directly opposed to the practice of his own country; in dealing, for example, with the question of neutral goods on an enemy's vessel, he is against the Dutch diplomacy and ordinances by means of which Holland had been enriching herself: and this attitude is the more remarkable as he occupied a prominent judicial position in his country's service. His reasoning is constantly emphasised by apt historical and legal allusions, though he carefully avoids that superfluous display of learning[2] which frequently interferes with the argument and obscures the principles laid down by his predecessors. His argument is characterised by the practical readiness and directness of a prudent and just man of affairs, rather than by the circuitous abstractions of academic subtlety. His convictions are supported not by metaphysical ingenuity, but by appealing to reason and common sense and the actual practice of his time. He is not partial to visionary theories, and yet does not apotheosise mere precedent. He takes a middle course, supplementing actual practice by the corrective criterion of reason, and interpreting the philosophical demands of reason in the light of actual facts, the necessities of

[1] *International Law* (Oxford, 1904), p. 583.

[2] Barbeyrac, in the preface to his translation of *De foro legatorum*, says: "Quand on est si riche de son propre fonds, on fait très bien de laisser à d'autres le soin d'emprunter ce qui a été déjà fait."

daily life, the inevitable human limitations, and the allowances to be made for the maintenance of harmonious international relationships. One may say that general utility is his determining principle, and the positive method his constant guide, the application of which is marked by a sound judgment, an active intellect, and wide learning.[1] Many of his decisions in difficult controverted questions, *e.g.* limits of territorial sea, have always been referred to as possessing high authority.[2] His writings throughout reflect a certain geniality and buoyancy of temperament; at times a dry vein of humour is introduced, as, for example, when he refers to the many disputes arising out of the classification of tobacco as contraband of war: nothing substantial, he says, really resulted from the controversy—it went off in smoke ("in fumum abierat"). It is, of course, possible to discover certain faults in Bynkershoek's work, such as a certain disposition to arrive at solutions, by his rigorous logic, of diverse matters which were already generally accepted, and a tendency to disregard the growing humaneness in the attitude of the time towards some of the incidents of warfare.[3]

To gain a better understanding of his doctrine, it is well to realise his position relative to the different juristic schools which had already been established before he began to write. In the thirteenth century we find "l'école canonico-internationaliste"[4] expounding a canonical theory of the law of war. In the next two centuries civilians take a wider range of subjects: questions of alliances and other international relationships, questions relating to war, and the ambassador. Writings increase in the sixteenth century, showing substantial progress in the conception of interstatal regulations; the scope is further widened, maritime matters and the rank of States receive more systematic treatment. The two most important writers of this time, the Spanish Jesuit Francis Suarez[5] and Albericus Gentilis,[6] have been termed[7] the precursors of Grotius. The *De jure belli ac pacis* (1625) of Grotius is really the first complete and methodical treatise, which soon began to exercise a profound influence on Europe. It attempted to reconcile to some extent

[1] Heineccius, in his edition of the first four books of *Observationes juris Romani* (Leipsic, 1723), says of him: "Admiratus præcipue viri eruditissimi judicium acre, ingenium solers, juris scientiam inusitatam ac denique incredibilem." Cf. also the opinion of Rivier of Bynkershoek's position as a civilian: "Auch als Civilist muss sein Name unter den ersten der grossen Niederländischen Schule genannt werden, neben Huber, J. Voet und Noodt" (F. von Holtzendorff, *Handbuch des Völkerrechts*, Berlin, 1885, Bd. i. p. 459).

[2] "Lord Mansfield spoke extremely well of Bynkershoek, and recommended especially as well worth reading his book of prizes, *Quæstiones juris publici*" (2 Bur. 690, in margin).

[3] "Des théories plus douces, plus humaines, ont définitivement prévalu quand le magistrat hollandais s'attache encore à prôner et à justifier de dures et cruelles maximes" (E. Nys, *Le Droit International*, Bruxelles, 1904, I. 252).

[4] P. Leseur, *Introd. à un cours de droit inter. pub.* (Paris, 1893), p. 74.

[5] *De Legibus*.

[6] *De Legationibus* (1583); *De jure belli* (1589).

[7] Rivier, in Holtzendorff's *Handbuch*, *op. cit.* I. § 85.

the conception of ethical transcendentalism with that of the practical necessity and utility of national and international policy—that is, a harmonising of the *jus naturale* with *jus voluntarium*, of which the former element is considered predominant as being "dictatum rectæ rationis,"[1] and which is "adeo immutabile, ut ne a Deo quidem mutari queat."[2] The positive or voluntary element is the result of the manifestation of the will of nations, which necessarily varies according to time and circumstances, but yet recognises the principle of utility.[3] Such consent is only to be considered as tacit like the "jus non scriptum quod consensus facit" of the Roman jurisconsults. This attitude of Grotius compels him to have constant recourse to ancient examples, and deliberately to avoid modern illustrations.[4]

Soon afterwards, the work of Zouche introduced an important modification of Grotius' doctrine. His book,[5] which has been called the first manual of the *positive* law of nations, lays the first foundation of the English School, though similar tendencies are already found in Selden.[6] With Zouche, the voluntary element, based on actual usage, is the more important; and again, unlike Grotius, he adduces examples and facts from more modern times. The *jus gentium* of Grotius becomes with Zouche the *jus inter gentes*, an expression which prepared the way for Bentham's *inter*national law.

In the seventeenth century the law of nations begins to be more widely and seriously studied, *e.g.* in the universities of England, Holland, Germany, and Sweden. Philosophical writers add a new note, urging a philosophical rather than a juridical basis for interstatal relationships. Conflicting tendencies are manifested; there is a wavering between the "naturalism" of Grotius and the "positivism" of Zouche, or a desire to effect a reconciliation. Thus, three schools had evolved—the "naturalists," the "positivists," and the "Grotians." Pufendorf[7] is at the head of the first. He starts from Hobbes' assertion,[8] the germ of which is found in Grotius, that the so-called law of nations is only an application of natural law to State relationships, maintains that the positive element has not the character of real law apart from the natural law, which alone possesses the legal sanction—"quod quidem legis proprie dictæ vim habeat, quæ gentes tamquam a superiore profecta stringat."[9] The positivists at first held that the positive element in the law of nations is distinct from the natural, and that the principles underlying usages and treaties possess legal force. This is the point of view of Textor and Rachel,[10] who emphasise the positive character of "jus plurium liberarum gentium, pacto sive placito expressim aut tacite initum, quo utilitatis gratia sibi invicem obligantur," and urge that the rules arising from

[1] Bk. I. c. 1, § 10. [2] *Ibid.* [3] Proleg. § 17.
[4] Cf. his own avowal, Proleg. § 58.
[5] *Juris et judicii fecialis, sive juris inter gentes*, etc. (1650).
[6] *Mare Clausum* (1635); *De jure naturali et gentium*, etc. (1640).
[7] *De jure naturæ et gentium* (1672).
[8] *De cive* (ed. 1669), c. xiv. § 4, p. 234.
[9] *Op. cit.* II. c. 3, § 22. [10] *De jure naturæ et gentium* (1676).

custom constitute a *jus gentium commune*, obligatory on States in general, whilst those arising from treaties form a *jus gentium proprium*, obligatory only on the contracting parties. The Grotians occupy an intermediate position; they retain the distinction between the *jus naturale* and the *jus voluntarium*, but, unlike Grotius, they consider the two of equal importance. This position was taken up in the seventeenth and eighteenth centuries by a large number of writers, of whom Wolf[1] and Vattel[2] are the most important.

The course of events in Europe after the Thirty Years' War tended, in many respects, to emphasise the positive aspect of international law. The principle of consent acquired greater influence than ever. The Peace of Westphalia (1648) was itself the first great act of European diplomacy, the first great international settlement by treaty. The meeting of the Protestant Powers at Osnaburg and that of the Catholic Powers at Münster are noteworthy events in the development of international relationships; the conception of European equilibrium became prominent, and the independence of States was recognised. The family of nations began to acquire somewhat more than a chimerical existence. The extension of maritime intercourse gave rise to usages and customs which gradually assumed the force of law, and diplomatic methods became more uniform and systematised. Congresses were held more frequently, and the rise of newspapers helped to spread the conclusions arrived at. Memoirs were published, and collections of diplomatic documents made. In France, England, and Germany collections of treaties were issued. Daniel von Nessel in 1690, and Leibnitz in 1693, were then led to bring together the treaties and diplomatic documents of every age and country.[3] Writers having now the actual facts before them, were not so ready to indulge in metaphysical abstractions, but were more disposed to draw generalisations from the mass of data furnished by the arranged catalogues of historical events. Thus it became clear that the development of the law of nations would be more fully understood and facilitated if time, place, and circumstance be taken into account, and the force of treaties and usage with their express or implied consent recognised. Grotius and Leibnitz[4] had already suggested the principle of utility, Cumberland[5] had emphasised it, it was admitted by nearly all subsequent writers, and later it became the basis of an entire political philosophy, such as that of Bentham. Now the modern school of jurists recognises, as is pointed out by Leseur,[6] the positive value and juridical nature of rules involved in treaties and customs, the possibility of a rational regulation of interstatal relationships, the self-sufficiency of positive law, which cannot be

[1] *Institutiones juris naturæ et gentium* (1750).

[2] *Droit des gens.* (Neuchâtel, 1758).

[3] *Codex juris gentium diplomaticus* (1693); and a supplement, *Mantissa codicis juris gentium diplomatici* (1700).

[4] *De usu actorum publicorum*, § 13.

[5] *De legibus naturæ*, c. v. § 1.

[6] *Op. cit.* p. 125.

superseded, but only guided, by natural law (the modern meaning of which is, however, different from that of Grotius), and attaches importance to systematic exposition and codification. And of this modern school it may with much truth be said that Bynkershoek is the precursor. "On peut dire de Bynkershoek et de G. F. de Martens, qu'ils sont les deux précurseurs de l'école moderne, qu'ils lui ont donné son orientation."[1]

Bynkershoek not merely lays stress on the positive element, but makes it almost exclusively the basis of his work. The will of nations, express or implied, is more important than elaborate theories of natural law, though there is in every system a place for reasoned criticism (*ratio*) serving as a corrective. He emphasises the avowal of Grotius: "Rationes, quæ pro se quisque afferunt, nihil definite concludunt, quia jus hoc, non ut jus naturale, ex certis rationibus certo oritur, sed ex voluntate gentium modum accipit."[2] The law of nations is derived from usages (*usus*), traditions and customs (*mores*), and the express consent of States (*consensus gentium*) as manifested in treaties. Usage is also based on the evidence of agreements and ordinances (*pacta et edicta*). In the absence of written law, the existence of long-established universal customs and practices is a presumption of their legal character, and of their binding force upon all men, "si . . . ratione utantur"; and in this manner rights are acquired by nations and obligations imposed on them, without which peace and war, commerce, embassies and alliances are meaningless.[3] Express consent always overrides the presumption of tacit consent.[4] Certain practices of other States may sometimes be contrary to our own advantage, but we should regard these in the light of reason and not from personal advantage or otherwise; "utilitas equidem nostra non admittit, sed de ratione, non de utilitate, omnis disputatio est."[5] The rules laid down by our laws and treaties are not alone sufficient to establish the law of nations; in order to be just and valid they must be consonant with reason. "Nulla ullorum hominum auctoritas ibi valet, si ratio repugnet."[6] Bynkershoek tries to obtain a harmonised combination of reason and custom as the whole basis of international law. This is, indeed, the truest ideal; but the difficulty is to determine precisely what is the real significance of reason. Sometimes *ratio*[7] is used in the earlier writers as it is used by the Roman jurisconsults, and in reference to the Roman law; at other times it is used in the sense of

[1] Leseur, *op. cit.* p. 125.

[2] *De foro legatorum*, c. xvii. p. 147 (ed. Vicat, *Opera omnia*, 2 vols. folio. Coloniæ, Allobrogum, 1761).

[3] ". . . Sine quo jure nec bellum nec pax nec fœdera nec legationes nec commercia intelliguntur" (*De foro leg.* c. iii., Vicat II. 125-6).

[4] "Voluntas expressa tacitam excludit" (II. 150).

[5] *De rebus bellicis*, c. ix. p. 179. Cf. also c. xii. p. 186, as to "ratio, juris gentium magistra."

[6] Ad lectorem, ii. 161.

[7] See the criticism, by Prof. Westlake, of the use of this term by writers generally (*Chapters on the Principles of International Law*, Cambridge, 1894, pp. 66-7).

intuition, or of moral consciousness, or of common sense. As employed by Bynkershoek, it may be adequately interpreted as signifying the logical exercise of common sense. He recognises that the Roman law, though the most admirable system of ancient jurisprudence, has been too much resorted to for the extraction of analogies; old codes, no matter how systematically and with what *elegantia* they have been constructed, do not necessarily fit new times and circumstances. The consent of modern States is far more important than the decisions enshrined in the Digest. Modern practice displaces ancient decrees. Bynkershoek quotes Wicquefort: "Les règles du droit public ne se tirent point du code, ni des digestes, et encore moins des décrets et des décrétales,"[1] and again and again urges that the modern law of nations depends on usage and custom, guided by reason.[2] He is one of the very few writers of the time who largely confine themselves to the most recent historical events,[3] diplomatic incidents, decisions of Courts or congresses, and declarations in the latest treaties. Of all writers, he is the first to make extensive use of the materials furnished by treaties, and the evidence of custom offered by them.[4] The decrees of the States-General are constantly referred to; indeed, his chapter on blockade [5] consists largely of a consideration of and commentary on the Dutch proclamation relative thereto. In this respect his treatment is analogous to that of such English writers as Selden and Zouche, who had directly applied the doctrines of the English Admiralty to controverted maritime questions of European importance, *e.g.* the sovereignty of the narrow seas, and the legal position of neutral commerce. New rules embodied in two or three treaties do not necessarily become law, for they may formulate special exceptions: ". . . . non satis constare an, quod illi pacti sunt, sit habendum pro jure publico, an pro exceptione, qua a jure publico diversi abeunt."[6] In examining the question of neutral goods on an enemy's vessel, he refers to the interpretation of treaties, which should always be understood *subjecta materia*, having due regard to the circumstances determining the true intention of the parties. Accordingly he denies a general scope to the treaties concluded in 1650, 1662, 1674, 1678, 1679, 1697, and 1713 between the States-General and Spain, France, England, and Sweden. It is interesting to note that Bynkershoek advises

[1] *De foro legatorum*, c. vii. II. 132.

[2] Cf. the emphatic passage, *ibid.* II. 132.

[3] "Hanc (auctoritatem) malim arcessere ab exemplis hic illic frequentatis quam a testimonio veteris alicujus poetæ vel rhetoris" (Ad lectorem, *Quæst. jur. pub.*). This passage contains also a sly reference to the practice of Grotius, from whom he deliberately differs.

[4] "Usus intelligitur ex perpetua quodammodo paciscendi edicendique consuetudine. . . . Dixi, ex perpetua quodammodo consuetudine, quia unum forte alterumve pactum, quod a consuetudine recedit, jus gentium non mutat" (*De rebus bellicis*, c. x. II. 181; cf. also *De foro legatorum*, c. iii. p. 126).

[5] I. c. xi.

[6] C. xv. p. 190; cf. Zouche, *De jure feciali*, Part 2, s. 8, Quest. 2.

a reference to arbitrators in case of dispute arising from the interpretation of treaties; for treaties have often been concluded and subsequently repudiated owing to lack of agreement as to their construction, and so nothing has remained of them but an empty name—"inane nomen."

So much, then, for Bynkershoek's general attitude to international law, his conception of its sources, his doctrine as to its growth, his theory in relation to the standpoint of his predecessors and contemporaries, his position in, and affinities with, the modern school; and more particularly his repeated insistence on the importance of custom and usage, the evidence of treaties, diplomatic documents, public ordinances and proclamations, and on the guidance of reason and logic impartially exercised. It will be well to consider now his more detailed treatment of several important questions concerning the sovereignty of the sea, the rights and duties of ambassadors, neutrality, contraband, neutral commerce, and certain special problems in the law of war.

The Sovereignty of the Sea.—The *De Dominio Maris* deals in a candid and unbiassed manner with the much-disputed question of the sixteenth and seventeenth centuries. The writer dispassionately examines in what cases the sea is capable of becoming the subject of sovereignty or exclusive jurisdiction; he discusses the pretensions to dominion that have from time to time been made by States; he strenuously opposes the doctrines of Gentilis and Selden, and adopts the views of Grotius and Pufendorf as to the common right of nations to liberty of navigation, of commerce, and of fishing in the open sea.

Grotius[1] accepted the principle of the Roman law,[2] and the distinction that seas were *res communes*, and navigable rivers *res publicæ*. But from the Middle Ages claims to dominion over various territorial and narrow seas were asserted,[3] monopoly of fishing was hence demanded, salute and other maritime honours were expected, and the power to exclude belligerent operations of other States was exercised.[4] Sovereignty was soon extended to wider zones, and the attempts to put down pirates and to police the seas assisted this expansion. Tolls and dues were exacted from foreign vessels in return for the security afforded to them; and such exercise of limited jurisdiction developed into an attitude of exclusive dominion. In this way arose the claims of Genoa to the Ligurian Sea, of Venice to the Adriatic, of France to an indefinite maritime zone round her shores, of England, likewise of Denmark, to seas off Norway, and, with Sweden,

[1] II. c. ii. § 12.

[2] "Et quidem naturali jure communia sunt omnium hæc; aer et aqua profluens et mare et per hoc litora maris" (Just. *Inst.* II. tit. 1, § 1).

[3] Cf. Lapradelle, "Le droit de l'État sur la mer territoriale" (*Rev. gén. de dr. int. pub.* t. v. 1898, p. 268); also E. Nys, *Etudes de dr. int. et de dr. politique* (Bruxelles, 1901), p. 181.

[4] *De Dominio Maris*, c. v. II. 107.

to joint-ownership of the Baltic.[1] The still more extraordinary claims of Spain and Portugal, in their work of discovery, aroused the protests of excluded nations, and soon the entire principle of maritime sovereignty began to be repudiated. Queen Elizabeth strenuously opposed the Spanish claims to the waters of the Indies.[2] Some writers like Ange de Ubaldis and Nicholas Everardi denied in general the right of ownership, if unsupported by long occupation; others like Alphonse de Castro combated more particularly the specific claims of Portugal, Genoa, Venice. The difficulties arising in the struggle between the United Provinces and Philip II. of Spain called forth further writings, such as the *Advocatio Hispanica* (1613) of Gentilis, the *Abridgement of all Sea-Lawes* (1613) and *De Dominio Maris* (1615) of William Welwood, the *Sovereignty of the British Sea* (1653) of John Boroughs; but of all such contributions, Grotius' *Mare Liberum* (1609) and Selden's *Mare Clausum* (1635) were the most important and exerted the greatest influence.[3] Grotius insisted on the necessity of effective occupation, opposed the establishment of permanent boundaries, distinguished between absolute property and sovereignty, and between the *oceanus apertus* and the *maria interiora*.[4] Selden did not clearly discriminate between territorial seas and the open sea; he asserted the sovereignty of England over the surrounding seas, and denied the claims of the Dutch to fish off the coasts.[5]

By the middle of the seventeenth century such wide claims were becoming rarer. The renewed pretensions of Charles I. and of Cromwell, and also of Genoa, were energetically denied by Pontanus and Graswinckel, whose arguments are often referred to by Bynkershoek.[6] The latter, following Grotius, adopts the Roman doctrine as to acquiring property. Continuous possession is essential, and this is not possible here. He points out the invalidity of Selden's argument (his "ambitiosa eruditio" notwithstanding), through confusing the *mare proximum* with the *mare exterum*, ridicules the traditional marriage of the Venetian doges to the Adriatic,[7] denies the English claims to maritime superiority, and does not consider that the conceding of naval honours to the English flag by his country necessarily implied any acknowledgment of the former's sovereignty,[8] and further objects to Selden's pretension[9] that a taking possession of the neighbouring

[1] Selden, *Mare Clausum*, II. cc. 30-2; Daru, *Histoire de Venise*, v. § 21; Loccenius, *De jure marit.* I. c. 4.

[2] Camden, *History of Elizabeth*, year 1580.

[3] Cf. Nys, *Origines du dr. int.*, etc. (Brux. 1894), p. 380 *et seq.*; Cauchy, *Le droit marit. int.* (Paris, 1862), ii. 95; Ortolan, *Diplomatie de la mer* (1864), p. 128; Hautefeuille (1869), p. 18 *et seq.*

[4] *Mare Liberum*, c. v.; *De Jure B. ac P.* II. c. 2, §§ 2, 3; I. c. 3, § 13; also Bodin, *La République* (Paris, 1577), I. c. 11, p. 215.

[5] Cf. conclusion of *Mare Clausum*; Walker, *Hist. of Law of Nations* (1899), vol. i. § 92, p. 164.

[6] *De Dom. Maris*, c. vi. II. 109; cf. Nys, *op. cit.* p. 388.

[7] *De Dom. Maris*, c. vi. [8] *Ibid.* c. v. [9] *Mare Clausum*, II. c. 30.

waters of a shore involves, *ipso facto*, a right, or even a definite anticipation, of further extending such authority to more distant portions of the ocean.[1] He admits, however, that certain portions of the sea are capable of exclusive dominion—in the first place, the *mare terræ proximum*, and secondly, such seas as are entirely surrounded by the neighbouring territory of any particular state, with an outlet into the ocean, of which both shores are exclusively occupied by it, *e g.* the Mediterranean to the Roman Empire, and, in his own time, the Black Sea to Turkey. He recognises, further, that in certain cases it is legitimate for a maritime Power to claim special rights over certain parts of the high sea; but these rights are distinct from complete sovereignty, inasmuch as they are to be exercised in the general interests of commerce and navigation, and to consist in privileges of police and superintendence.

As to the limits of the territorial sea, Bodin,[2] relying on a dictum of Baldus, had asserted that sovereigns of maritime nations had a right to an extent of at least sixty miles from the shore. Bynkershoek was the first to solve the problem, or at least to offer an acceptable definition of marginal waters. Effective protection, depending on the force of arms, is made the criterion of territorial sovereignty; . . . "potestatem terræ extendi quousque tormenta exploduntur, eatenus quippe cum imperare, tum possidere videmur; . . . alioquin generaliter dicendum esset, potestatem terræ finiri, ubi finitur armorum vis."[3] The marine league, as being originally the distance from the shore measured by a cannon-shot, was thenceforth accepted as the limit of territorial waters; and Bynkershoek's proposal has been adopted not only in private legislation, but also in great international documents, such as the North Sea Fisheries Convention of 1882.[4] Some attempts have been made[5] in recent times to extend this limit, but there is no doubt that the rule of the three-mile limit remains part of modern international law.

The Legal Position of Ambassadors.—At the time Bynkershoek wrote his *De foro legatorum*, opinion on the legal status of ambassadors was far from unanimous. The two chief points considered are their inviolability and independence. The former principle was universally admitted in theory, and generally followed in practice, even in the case of an enemy's envoy in the Saracen wars; but in the thirteenth century it rested rather on the promise made, and on the moral obligation to remain faithful to it, than on any recognition of its legal significance.[6] The independence of ambassadors was not so readily admitted. Some writers had denied their immunity

[1] *De Dom. Maris*, c. iii. II. 104.

[2] *La Republique*, I. c. x. p. 170.

[3] *De Dom. Maris*, c. ii. II. 103-4.

[4] Hertslet, *Collection of Treaties*, XV. p. 795.

[5] See *Brit. State Papers, North America, United States* (1864), LXII. pp. 19-29; and also Wharton, *International Law of the United States*, §§ 32, 327.

[6] Cf. Joinville, *Histoire de Saint Louis*, c. lxxi., as to the practice which then prevailed.

by invoking the authority of the Roman jurisconsults in reference to the *legati*; but Bynkershoek pointed out [1] that the analogy was untenable, owing to their different functions. Afterwards, the fiction of exterritoriality was conceived, as a device to guard public ministers representing their sovereigns against local caprice or disturbance,[2] but this did not extend to their suite or servants till much later.[3] In 1576 Pierre Ayrault [4] urged the criminal exemption of ambassadors from the local jurisdiction for reasons of law as well as of fact. Albericus Gentilis and François Hotman dealt more fully with the question of an envoy's conspiracy against the sovereign to whom he is accredited. These two jurists were consulted by the English authorities in the famous case of Mendoza, the Spanish ambassador, who had conspired against Elizabeth. He was ordered to leave the country, and a commissioner was sent to Spain to prefer a complaint against him.[5] Grotius held that the ambassador and his suite are free from local jurisdiction by the tacit consent of nations. But in the case of Don Pantaleon Sa (brother of the Portuguese ambassador in England), who was tried for murder in 1653, found guilty, and executed, the claim of exemption on the ground of belonging to the ambassador's suite was rejected by the Court. Zouche, who was one of the judges, concurred in this decision.[6] Wicquefort's work [7] (1679) is merely a collection of examples. The systematic development of doctrine and formulation of principles from given data was reserved to Bynkershoek, who at once grasps the fundamental distinction between law and politics—"quod iterum prudentiæ politicæ est, cujus causam a jure gentium semper distinguendum esse reor." [8] He holds that all public ministers, irrespective of title or grade, have an equal right to protection, as well as their families, servants, and suite, and criticises his own government for not always acting on this principle. The competence of the civil tribunal depends on domicil as to the person, and on the *lex rei sitæ* as to property. He agrees with Hilligerus that in respect to property a king is on the same footing as an ordinary subject: it may be seized to satisfy just claims; but only such goods of an ambassador are attachable as are not necessary to him in his official capacity, except household goods for his or his family's personal use.[9] An ambassador who takes part in commercial transactions becomes liable for resulting debts, just as an ordinary merchant,[10] though even here diplomatic proceedings

[1] *De foro legatorum*, c. i.

[2] Pradier-Fodéré, *Cours de droit diplom.* I. 272; Rolin-Jacquemyns, *Consultation dans l'affaire Arnim*, p. 123.

[3] *Rev. gén. de droit int. pub.* t. viii. (1901), p. 493; Pillet, *Le droit int. pub., ses éléments constitutifs . . .* (Paris, 1894), p. 13.

[4] *L'ordre, formalité et instruction judiciaire . . .* Bk. I. Pt. IV. s. 12.

[5] Walker, *op. cit.* I. § 98.

[6] Cf. his dissertation on the subject: *Solutio quæstionis veteris et novæ de legati delinquentis judice competente* (Oxon. 1657).

[7] *L'Ambassadeur et ses fonctions* (Cologne, 1679).

[8] *De foro leg.* II. 156. [9] *Op. cit.* c. xvi. [10] *Op. cit.* c. xiv. II. 141.

are perhaps more advisable. Unlike Wicquefort, Bynkershoek maintains that a subject of the State to which he is accredited minister by another State is not entitled to any immunities—which is but the logical sequence of his fundamental principle.

As to criminal jurisdiction, a distinction is made between crimes against the individual and those against the State. He considers the case of Don Pantaleon Sa,[1] and says contradictory precedents are insufficient, only general practice being reliable. Ambassadors cannot be tried and punished by the local tribunal, though in crimes against the State they may, in accordance with the customs of the seventeenth and eighteenth centuries, be arrested, examined, and, if found guilty, expelled.[2] On the principle that consent renders competent an otherwise incompetent tribunal,[3] an ambassador may renounce his privilege of *renvoi*, or any other exemption, and submit to the local jurisdiction, if his sovereign consent. The house of an ambassador is inviolable to the same extent as his person;[4] but it may not offer refuge to criminals.[5] Finally, third Powers are forbidden all measures of reprisal or retorsion against ministers; though a State is permitted to avenge any injury inflicted on its own ambassadors.

In the seventh chapter of *De rebus varii argumenti*, the question is examined whether an ambassador's acts, which are contrary to his secret instructions, are binding on his sovereign. Apart from the fact that there is no strict analogy between international conventions and private contracts, the possibility of involving great issues brought about the practice, general in Bynkershoek's time, of requiring ratification by the sovereign, except when the entire instructions are contained in the patent full power. But if the minister goes beyond these instructions, or in any other way manifestly exceeds his authority, the sovereign is not bound; though he is bound if the acts are within the limits of his known authority, and he has exceeded only secret instructions. This doctrine has received the support of various recent writers.[6]

The Law of War.—The *De rebus bellicis* does not present a comprehensive treatment of the laws of war, but deals thoroughly and practically with certain matters of prime importance. Bynkershoek's aim is not to compile a code, after the fashion of Grotius and Puffendorf, but to suggest solutions to urgent problems. It is not too much to say that his treatment

[1] CC. xvii. xviii. and xix.

[2] C. xvii. II. 147. Cf. the cases of a Spanish ambassador's secretary, implicated in a plot (1605) to deliver up Marseilles to the Spanish (Walker, *op. cit.* I. 179); 1716, Gyllenberg, a Swedish minister, accused of conspiracy (Mahon, *Hist. of England* . . . I. 389); 1718, Cellamare, Spanish ambassador in France, of conspiracy against the Regent (De Martens, *Causes célèbres*, I. 139).

[3] Dig. V. tit. i.

[4] See Politis, *Rev. gén. de droit int. pub.* III. 694.

[5] C. xxi. II. 152.

[6] *E.g.* Klüber, § 142; Phillimore, II. lii.; Heffter, § 87.

of commercial and maritime questions, and especially the relationships between neutrals and belligerents, is more thorough, more searching, more related to actual practice, more pervaded with sound sense, with legal and statesmanlike skill, than that of any other work on the subject before his time.

The tendency of the philosophical writers of the eighteenth century was to lay greater obligations on belligerents and to impose certain restrictions on their rights in warfare. The actual practice of the century was otherwise; and Bynkershoek was inclined to the sterner attitude. Fighting for a just cause sanctions the use of every means to attain the desired aim speedily and effectively. Justice is the essential of war; generosity is only an accident. "Justitia in bello omnino necessaria est, animi vero magnitudo a mera voluntate proficiscitur."[1] Humanity, clemency, piety, and other magnanimous virtues are certainly noble, but cannot be insisted on by law.[2] Reason (by which he often means the logical rigour and impartiality of nature) permits the use of all means except perfidy against an enemy.[3] Hence his definition: "Bellum est eorum, qui suæ potestatis sunt, juris sui persequendi ergo, concertatio per vim vel dolum,"[4] the main defect of which is the omission to emphasise, as Grotius had already done,[5] that war is a state or condition; the inclusion also of *dolus* is superfluous.

Grotius held that custom requires a declaration of war, but Bynkershoek cites many examples to refute him; unless there is a special convention to the contrary, it is not necessary. As a rule the opening of hostilities implies a cessation of commercial relations; but commerce is, in the interests of the subjects, sometimes permitted, either generally or as to certain merchandise only.[6] Hence peace and war may coexist. "Pro parte sic bellum, pro parte pax erit inter subditos utriusque principis."[7] This is a strange position in view of his rigorous general doctrine. There are at times certain contradictions in Bynkershoek's writings, due to his reasoning, on the one hand, inductively from usages and customs, and on the other, deductively from "reason"; and occasionally the conclusions reached are different, and are not compromised or reconciled. His recognition of the possibility to maintain warlike and commercial relations simultaneously has been claimed as the secret which explains so many apparent contradictions in our modern law of nations.[8]

We may exercise the rights of war only in our own territory, in the

[1] C. i. II. 164. [2] C. iii. II. 167. [3] C. i. II. 163. [4] *Ibid.*

[5] "Status per vim certantium qua tales sunt" (I. 1, 2, 1).

[6] In the time of Bynkershoek, however, the practice of "licences de commerce" was rare. See Kleen, *Lois et usages de la neutralité* (Paris, 1900), II. 227.

[7] C. iii. p. 168.

[8] "C'est ici qu'une remarque profonde de cet habile publiciste vient éclairer la question d'un jour nouveau, et nous révéler, pour ainsi dire, le secret qui explique tant de contradictions apparentes de notre droit des gens modernes" (E. Cauchy, *Le droit marit. inter.* Paris, 1862, p. 60).

enemy's, or in a territory which belongs to no one.[1] To commit hostilities on neutral territory is to make war on its sovereign, who is obliged to use every means to prevent belligerent operations, and to compel a restoration of any property there captured. A combatant's necessity, in this respect, is no sufficient justification. Retaliation is to be exercised directly against the enemy and never through the injury of a neutral. The decree of the States-General, October 10, 1652, rightly prohibited violence in a neutral's port, because of the danger to the neutral. Hence, it is unlawful to commence an attack in neutral territorial waters, within cannon-shot, but if the attack has already begun elsewhere, it is perhaps permissible—"dum fervet opus"—to pursue the enemy to jurisdictional waters, provided the neutral's interests are not injured.[2] This opinion, however, is given conditionally, and Bynkershoek admits that it is by no means universally accepted by his contemporaries.

As to private property in war, he lays down the general rule—"Quæcumque hostium sunt, recte capimus, ex autem bona pars sunt imperii hostilis, quæque ita hosti, prodesse, nobis nocere possunt." Neutrals on enemy's territory may be considered as enemies; and their goods, if previously taken by the enemy, may be lawfully captured by us. Little attention is given to the immunities of private persons or property during a state of war; but the conditions under which an enemy may acquire property in captured movables or immovables, or the conditions under which they return to the former owners, are considered more fully. Capture does not, *ipso facto*, confer rights of property; apart from any title, it merely operates as a conditional transfer. Grotius' criterion of twenty-four hours' just possession[3] does not always hold good.[4] Firm possession follows on conveyance of the prize *intra præsidia*, so that it may effectively be defended, *i.e.* the question is one of real possession and not one of arbitrary limitation of time,[5] though twenty-four hours' possession *intra præsidia* is a presumption of just possession. The same rule is also given by Loccenius,[6] and, in later times, followed by Sir William Scott, who refers to the principles laid down in the *Consolato del Mare*,[7] and in the work of Bynkershoek. The general rule may be modified by special circumstances in any particular case; but the fundamental point is an ability to defend the prize.

The rights of postliminy, consequent on recapture, do not apply if the enemy obtained possession in any other manner than by force. The case of

[1] "Jure belli adversus hostem duntaxat utimur in nostro, hostis, aut nullius territorio (c. viii. p. 177).

[2] C. viii. I. 178.

[3] ". . . Recentiori jure gentium inter Europæos populos introductum videmus, ut talia capta censeantur, ubi per horas vigintiquatuor in potestate hostium fuerint" (*De Jure B. ac P.* Bk. III. c. 6, § 3, n. 2).

[4] Cf. case of the *Santa Cruz*, 1 C. Rob. 58.

[5] C. iv. p. 169.

[6] *De Jure Marit.* Bk. II. c. iv. s. 4.

[7] *The Ceylon* (1811), 1 Dod. Adm. Rep. 105.

immovable property differs from that of movable. The former when recaptured returns to the original owner by postliminy, but the latter, retaken from the enemy, vests in the recaptors; since recapture effects as valid a transference as capture. A belligerent may condemn enemy's property whilst lying under capture in a neutral port. The same opinion was expressed in 1789 by Sir William Scott and the whole Court of King's Bench, though later this great judge advanced a different doctrine.[1] In the United States, decisions were given in several cases[2] in conformity with Bynkershoek's view, which, indeed, accorded with long-established European practice. A reward must be given to the recaptors by the original owners for their sacrifice and risk, to be estimated by impartial assessors. He approves the rule, in this respect, of the *Consolato del Mare*, which, however, he believes to be largely a "farrago of nautical laws."[3] If a portion of a country be occupied, the whole is considered in occupation and possession, if such has been the intention of the captor, and if the vanquished enemy has retained no other part of it.

It is permissible to confiscate an enemy's actions and credits (*actiones, nomina*), but not if war is so mildly carried on that commerce continues between the combatants. Though an enemy, as such, forfeits his *persona standi in judicio*, as it is expressed in the decrees of the States-General of October 2 and 29, 1590, and so held in subsequent cases, yet there is an exception when commercial intercourse is allowed on both sides.[4] Vattel acknowledges the legality of such confiscation, but points out that in more recent times a more liberal practice was generally adopted.[5] If, however, credits and actions have not actually been handed over to the sovereign, the former right of creditors revives at the conclusion of peace, by an application of the principle of postliminy. "Si exegerit, recte solutum est, si non exegerit pace facta reviviscit jus pristinum creditoris. . . . Nomina igitur, non exacta, tempore belli quodammodo intermori videntur, sed per pacem, genere quodam postliminii, ad priorem dominum reverti."[6]

If before the war we owned in the enemy's country any property which, during the war, had been concealed and therefore not confiscated, it returns to the former owners and does not become the property of the recaptors, in case it is retaken by our subjects.[7]

As to the right of postliminy on an ally's territory, Bynkershoek says:

[1] *Smart* v. *Wolff*, 3 Term Rep. 329.

[2] Cf. *Rose* v. *Himely*, and *Hudson* v. *Guestier*, 4 Cranch's Rep. 241, 293; see also Lampredi, *Del Commercio*, etc., Pt. I. § 14.

[3] "Dando a quelli che a i detti nimici tolta haveranno, beveraggio conveniente, secondo la fatica che ne haveranno avuta, e secondo il danno che ne haveranno sofferto" (c. 287, § 1136).

[4] C. vii. p. 176.

[5] "Mais aujourd'hui, l'avantage et la sûreté du commerce ont engagé tous les souverains de l'Europe à se relâcher de cette rigueur" (Bk. III. c. 5, § 77).

[6] C. vii. p. 177.

[7] *Ibid.*

"He who returns to his sovereign's ally is entitled to the right of postliminy because he is deemed to have returned to his own country; for allies are considered as constituting one State with ourselves" ("Qui revertitur ad fœderatos, jus postliminii habet, qui ad suam civitatem videtur reversus, fœderati enim nobiscum unam quodammodo civitatem constituunt").[1] Similarly, if our property, captured by enemies, eventually comes into the territory of our ally, it is regarded as having been restored to us.[2] The propositions laid down regarding postliminy on neutral territory will be misleading, unless due attention be given to the distinction between military rights, accruing to the belligerent through capture or conquest, and civil rights, acquired apart from war by contract or otherwise. Actual possession is the criterion of military rights, ordinary proof of title being that of civil rights. Hence a prize taken by captors or their agents into neutral territory does not return to its former owner: for to the neutral State possession is evidence of the military right, and in such a case, as Hertius says, the fact must be taken for the law.[3] From this it follows that if after having been captured a vessel escape, or be taken into a neutral territory by others than the original captor, or his agents, the civil right of the former owner revives, and the property returns to him. It does not, of course, apply to cases of regular condemnation by the captor's tribunal, which would turn the military into a civil right. Further, as Bynkershoek says, this is true only of captures made in regular warfare: capture by pirates in no way transfers the property. Respecting the right of postliminy as applied to cities and States, he approves the rule of Grotius that "the right of postliminy is applicable to a whole people, as well as to an individual, and that a political body, which was free before, recovers its liberty when its allies, by force of arms, deliver it from the power of the enemy."[4]

Neutrality.—The conception of neutrality was not unknown in ancient times, *e.g.* among the Greeks, but there was never systematic practice. Rome regarded another State either as an ally or an enemy: "Romanos aut socios aut hostes habeatis oportet, media nulla via est."[5] In the Middle Ages feudalism favoured a similar view. With the increase of maritime commerce and other State relationships, and the founding of colonies, the notion of neutrality became more clearly defined. The objects of war became changed, and peace was promoted by the Church. "Mais le grand facteur de la neutralité a été surtout un sentiment de solidarité intéressé et d'ordre économique."[6] Treaties and conventions began to play a prominent part. Early in the seventeenth century practice was unsettled and capricious, and the doctrine of Grotius was inadequate

[1] C. xv. p. 190.
[2] C. xv. p. 191.
[3] *Adnot. ad Puffend. De Jure Nat.*; see also Grotius, Bk. VIII. c. 6, n. 25.
[4] *De Jure Belli ac Pacis*, Bk. III. c. 9, § 9, n. 1.
[5] Livy, xxxii.
[6] A. Thonier, *Contrebande de Guerre* (Bordeaux, 1904), p. 9.

and incoherent, being one of the most unsatisfactory portions of his work. By the eighteenth century the duty of impartiality and respect of neutral territory began to be more seriously recognised. Later, Bynkershoek and Vattel formulate more thorough principles of neutrality; and, in some respects, the doctrines of the former, though he wrote earlier, are more advanced than the latter's, in spite of the fact that Bynkershoek uses the negative expression *non hostes*, and Vattel adopts the more significant *neutralité* and *neutres*. Greek writers[1] had used the phrases ἡσυχίαν ἄγειν (to keep silent), ἐκ τοῦ μέσου καθῆσθαι, and ὁ διά μέσου (expressing the idea of an intermediate position); Roman writers spoke of *medii*, *amici*, *pacati*, words used also in the Middle Ages. In a proclamation of the King of France, 1408, *neutralitas* is used in reference to the popes of Rome and Avignon; and a little later, in the German and Swiss wars, the terms *stille sitzen* and *Unpartyschung* are found. In a convention between England and Denmark, 1465, *guerrarum abstinentiæ* appears, and at the end of the century *neutralité* is common in treaties, conventions, and edicts. In the Thirty Years' War, we get the Germanised *Neutralität*; and again Machiavelli and Guicciardini make use of *neutralità*, and Bodin uses *neutralité* and *neutre*. Grotius reverts to the Roman form *medii in bello*, and Bynkershoek calls neutrals *non hostes*, defining them as those "qui neutrarum partium sunt."

Bynkershoek occupies a high place in the discussion of neutrality,[2] though not all his propositions are now accepted. Grotius' treatment is vague and meagre; Zouche relies more on State policy than on law: Puffendorf denies to neutrals the right of undisturbed commerce, apart from special conventions. Unlike Grotius and Vattel, Bynkershoek does not allow a neutral to judge as to the just or unjust cause of belligerents and offer help accordingly, except when the two combatants are both allies of the neutral, and there is no treaty otherwise regulating the relationships. The general principle is "belli justitia vel injustitia nihil quicquam pertinet ad communem amicum,"[3] subject to the rare exception suggested, which, of course, applies only to treaties concluded before the war,—"bello jam exorto . . . neutri amico auxilia recte vel promittuntur vel mittuntur."[4] Our tributary or protected States may assist their immediate sovereign against us, but not with arms and men.[5]

Bynkershoek clearly recognises the claims of neutral commerce, and the necessity to effect a reconciliation, legally rather than diplomatically,

[1] E. Nys, *Études de dr. int. et de dr. pol.*, 2me série (Brux. 1901), p. 57.

[2] "Dans l'histoire de la doctrine de la neutralité, Bynkershoek occupe un rang distingué" (E. Nys, *op. cit.* p. 86).

[3] C. ix. p. 179.

[4] C. ix. p. 180. (As to allies and neutrality, see the opinion of Lord Hawkesbury, afterwards Earl of Liverpool, in his *Discourse on the Conduct of the Government of Great Britain in respect to Neutral Nations*, London, 1794, p. 68.)

[5] P. 181.

of the conflicting interests of neutrals and belligerents. Reason, and not personal advantage is to be the guide—"de ratione, non de utilitate, omnis disputatio est." The main guiding principles, presenting a substantial advance on the ideas and practice of the time, are an obligation on the neutral not to assist one belligerent in any way which would be detrimental to the other—"si medius sim, alteri non possum prodesse, ut alteri noceam"—and a corresponding right not to be injured by the belligerents in its pacific commerce—"qui injuriam non fecit non recte patitur." With Bynkershoek it is mainly a question of supplying subsidies and materials; the enlistment of troops on neutral territory is not prohibited, if there is no law or declaration to the contrary. In this respect he is at one with Grotius, Wolf, Galiani, and other publicists of the time, and with the practice then prevailing. The right of recruiting was frequently allowed in treaties, *e.g.* in 1656 between England and Sweden.[1]

Contraband.—The Roman emperors prohibited commerce with the barbarians in certain articles, *e.g.* arms, iron, etc., and later the popes forbade trade with the infidels in weapons and munitions of war—*merces banno interdictæ.* Sovereigns assumed the right to draw up lists of contraband goods, and vary them at pleasure. The growth of commerce fostered clearer notions; and treaties were concluded in favour of the pacific trade of neutrals. The Treaty of the Pyrenees (1659), in Art. 12, specifies goods which are contraband, *e.g.* objects directly connected with war, also saltpetre, horses, and saddles; and in Art. 13 declares provisions and other necessities of life to be free. In the Treaty of Utrecht (1713) contraband goods are enumerated (Art. 19)—horses, harness, warlike arms and instruments. As to provisions, they are declared contraband in the treaties of 1303 between France and England, of 1613 between Sweden and the Hanseatic towns, of 1625 between England and the same, of 1654 between England and the United Provinces; but excluded in the treaties of 1655 between Louis XIV. and the Hanseatic towns, in the treaties of the Pyrenees and Utrecht, and in the Treaty of Versailles, 1786. The writers of the eighteenth century were as inconsistent in their theories as the age was in its practice. Thus Heineccius,[2] writing in 1721, regarded as contraband not only arms and munitions, saltpetre, and horses, but also cordage, sails, and other naval stores, and further included provisions.

Bynkershoek refers to Grotius' threefold classification of objects—(1) those useful for purposes of war; (2) those not so useful; (3) those which may be used either in war or peace; and says that there is no doubt as to (1) and (2). As to (3) Grotius permits the intercepting of *res ancipitis vel promiscui usus*, but only in case of necessity, and then under the obligation of subsequent restitution. But Bynkershoek points out that the difficulty is in determining who is to be judge of that necessity—". . . Quis arbiter

[1] Dumont, *Corps universal diplomatique*, etc., VI. ii. 3, and VI. ii. 125.

[2] *De Nav. ob Vect. Merc. Vetit.*, xiv.

erit ejus necessitatis, nam facillimum est eam prætexere"—that it is against law to sit as judges in our own cause, and further that Grotius' distinction is not supported by the usage of nations. His own definition is: "Contraband articles are such as are proper for war, and it is of no consequence whether or not they are of any use out of war."[1] Are the materials themselves contraband, out of which contraband articles are made? Zouche[2] inclines to this opinion; but, says Bynkershoek, reason and usage point to the contrary—"ego non essem, quia ratio et exempla me moveant in contrarium."[3] If all such materials are prohibited, the catalogue of contraband goods will be enormous, amounting to a total prohibition of commerce.[4] However, certain articles may be decreed contraband, not from their intrinsic nature, but from other special circumstances, *e.g.* from the large quantity required, such as saddles, holsters, belts; or in anticipation that prohibiting certain articles will quickly bring the war to an end, *e.g.* provisions, when the enemy is besieged;[5] or generally those articles without which the enemy could not possibly continue the war. He states that the last two exceptions accord with the decrees of the States-General of December 5, 1652, against the English, and of December 31, 1657, against the Portuguese. As to the decree of May 6, 1667, against Sweden, there was a special reason, viz. the right of retaliation, as therein expressed, for prohibiting even materials not themselves fit for purposes of war, but which might be so adapted. Zouche relates that there was a dispute between England and Spain regarding tobacco, which, Spain contended, might be used for preserving provisions; but Bynkershoek repudiates the action of Spain, as tobacco cannot be of any use in destroying the enemy. The tendency of Bynkershoek is clearly to lay down a definite rule restricting contraband, but finding that it would be opposed to the practice of his own country, and, indeed, of the European countries in general, he seeks to extract from such usage and from the circumstantial dispositions of treaties certain exceptional rules, which all but destroy the force of his fundamental principle.[6] But great difficulties in connection with contraband were met with in later times, and there is by no means unanimity of opinion at present. The First and Second Armed Neutrality of 1780 and 1800 endeavoured to limit the kinds of articles that could be regarded as contraband, but they failed; and the Declaration of Paris of 1856 makes use of the term "contraband" without any attempt to define it.

[1] "Contrabanda dici, quæ uti sunt, bello apta esse possunt, nec quicquam interesse, an et extra bellum usum præbeant" (c. x.).

[2] *Op. cit.* Part 2, § 8, Quest. 8.

[3] C. x. p. 182.

[4] "Si omnem materiam prohibeas, ex qua quid bello aptari possit, ingens esset catalogus rerum prohibitarum, quia nullo fere materia, ex qua non saltem aliquid, bello aptum, facile fabricemus. Hæc interdicta, tantum non omni commercio interdicimus, quod valde esset inutile" (c. x. II. 182).

[5] C. ix. p. 180.

[6] Cf. Leseur, *op. cit.* p. 104.

Respecting the treatment of vessels carrying contraband, Bynkershoek is opposed to the declarations in the various Dutch decrees and treaties between the Peace of Westphalia and the Treaty of Utrecht, according to which only the contraband goods were to be confiscated and the vessel carrying them allowed to go free. His doctrine, an application of the Roman law[1] and followed by many eminent jurists amongst his successors, was that though the owner or master was unaware of the illegal nature of the cargo, the vessel also could be justly seized. Further, if the cargo consist of a mixture of lawful goods and contraband, and both belong to the same owner, the whole may be condemned; if they belong to different owners, then the illegal act of one ought not to affect the legal act of the other. This is in full agreement with the rule laid down by Zouche.[2] By a French ordinance of July 26, 1778, only contraband goods were to be confiscated, unless they amounted to three-quarters of the entire cargo, in which case the whole merchandise would be condemned, as well as the ship. Art. 17 of the treaty between Great Britain and the United States, November 19, 1794, stipulated "that in all cases where vessels should be captured or detained on just suspicion of having on board enemy's property, or of carrying to the enemy any of the articles which are contraband of war, the said vessel should be brought to the nearest and most convenient port; and if any property of an enemy should be found on board such a vessel, that part only which belonged to the enemy should be made prize, and the vessel should be at liberty to proceed with the remainder without any impediment."

Blockade.—Bynkershoek holds that everything carried to a blockaded or besieged place, contrary to law or treaty, is to be considered as contraband and treated accordingly; and usage sanctions the infliction of the capital penalty on offenders, or a milder punishment according to the circumstances of the case. In the time of Vattel, however, a milder policy prevailed; such offenders could be regarded as enemies, but usually only their goods were confiscated. Earlier in the work, Bynkershoek says that retaliation is to be exercised only on the offending party—"retorsio non est nisi adversus eum qui ipse damni quid dedit, ac deinde patitur, non vero adversus communem amicum";[3] but here he maintains that an injury inflicted on a neutral is justifiable on the principle of retaliation upon the enemy—a view adopted in consequence of the edicts of the States-General against the Spaniards. The rules as to what vessels may be captured he derives from an examination of the famous Dutch decree of 1630, which presents the first systematic State legislation governing the question of blockade. "Le décret hollandais du 26 juin 1630 promulgué déjà avant l'indépendance, dans le but de régler un blocus des ports de Flandre relevant de la domination espagnole, est considéré comme la première législation nationale

[1] Dig. III. tit. iv. [2] *Op. cit.* Part 2, § 8, Quest. 13. [3] C. iv.

du blocus moderne. En effet, on y trouve ses premières règles définies."[1] Thus the following vessels may be captured and confiscated: (1) those found so near to the blockaded ports as to show clearly an intention to enter therein, unless it appears that they were driven there by stress of weather; (2) those found at a distance from the ports, but whose papers indicate an intention to enter, unless before the offence is committed they alter their course of their own accord;[2] (3) those vessels issuing from such ports, not having been forced thither by stress of weather, even though taken at a distance: unless after leaving the ports they had performed a voyage to a port of their own country, or to some other neutral port; but liable to confiscation if on issuing from the blockaded port they are pursued to their own or to any other port, and afterwards found on the high sea coming out of the latter port.

Bynkershoek admits the rigorous character of these rules, but he says the severity may be relaxed, if thought fit, and, indeed, has often been relaxed. "Sed mutatis hominibus sententias mutari quid obstat?"[3] He states further that the above decree was put into effect by the application of a sufficient force to maintain the blockade; and does not make any suggestion that a blockade by proclamation, or a "paper blockade," could lawfully impose any restriction on neutral commerce. Actual practice in the seventeenth century was very changeable, and was often adapted to the demands of self-interest; and Bynkershoek repudiates the inconsistency in the conduct of his own country.

Neutral Goods on Enemy's Vessels.—The two cases of neutral goods on an enemy's vessel, and enemy's goods on a neutral vessel, are considered in a more liberal manner than had been done before, and often in antagonism to Dutch policy. At the time he wrote three systems[4] had been developed: (1) the doctrine of "hostile infection," represented by the French ordinances of the sixteenth century, of 1681, and of 1704, by which ships and goods connected in any way with enemy's goods or vessels were condemned; (2) the rule of the *Consolato del Mare* (*suum cuique*), by which only the enemy's property, vessel or cargo, was seizable, and a neutral vessel was not necessarily regarded in the light of neutral territory; (3) the rule of Utrecht, the principle of which is free vessel free goods, enemy vessel enemy goods—that is, liberty or condemnation depends only on the nationality of the carrying vessel.

Bynkershoek does not accept the rule of Utrecht; one or two special treaties, he insists, are not necessarily evidence of international law. The rule that neutral goods found on an enemy's vessel may be condemned is

[1] R. Kleen, *Lois et usages de la neutralité* (2 vols., Paris, 1898-1900), I. 543.

[2] In his case Bynkershoek is not fully determined; for the matter is to be decided according to conjectures and circumstances.

[3] C. xi. p. 185.

[4] See J. Delpech, *Bynkershoek*, in *Les fondateurs du droit international* (Paris, 1904) pp. 385-446; and Thonier, *op. cit.* p. 77.

contrary to reason; at most it is only a presumption that they belong to the enemy, as Grotius also thinks. They cannot be confiscated even if the shipper knew it was the enemy's vessel. The essential criterion is—Have I, in shipping the goods, intended to do you an injury? The various questions as to whether the owner of the merchandise on the enemy's vessel knew of the war or not, and whether, knowing this, he knew his conduct to be legal or not—all these fine-spun niceties may indicate legal ingenuity, but will not satisfy unsophisticated common sense. "Sed hæ sunt pragmaticorum lautitiae, quibus indoctum vulgus excipiunt."[1] He is largely in agreement with the *Consolato del Mare*, by which the enemy's vessel is seizable, but the neutral goods on board must be returned to their owners; he differs in not allowing freight should the vessel be carried into the captor's port.[2]

In the case of enemy's goods found on a neutral vessel, he is against the principle of hostile infection, and agrees with that of the *Consolato del Mare*. The enemy's goods may be seized, but the neutral vessel must go free, unless, of course, the owner was aware that the cargo was contraband. The right of visitation and search is allowed. It is lawful to detain the vessel, and to ascertain, not merely by the flag, which may be fraudulently assumed, but by the documents on board, whether she is really neutral, and whether enemy's property is concealed therein.[3] In a word, a neutral commits no offence against the law of nations in carrying enemy's goods, which are seizable *ex re*, the neutral vessel going free; but to carry contraband is an offence *ex delicto*, and hence both the contraband goods and the vessel are liable to confiscation.

As to privateering, Bynkershoek is severer than Gentilis or Grotius; though he deprecates the defence of necessity which is often put forward in the subordination of neutral rights to those of belligerents. If a privateer makes an illegal capture, the captain is liable for the damage suffered, should he have exceeded his authority; but if he has acted according to his authority, then the owners of the vessel are liable for all damage, whether the captain is dishonest or unskilful. The owners of the vessel are not liable if they have not appointed the master for the purpose of making captures. If a vessel is not a privateer, *i.e.* has no commission, and makes captures by order of the owners, the same rules apply as though she were a regular privateer. Should a non-commissioned vessel, attacked by an enemy, capture the enemy's vessel, the prize belongs to the master

[1] C. xiii. p. 187.

[2] *Ibid.* p. 188. (Cf. the opinions of Heineccius, *De nav. ob vect. vetit.*, etc., c. ii. § ix.) In *The Fortuna*, the captor of an enemy's vessel was held not entitled to freight on neutral goods unless he took them to the port of destination; in *The Diana*, freight was allowed in certain cases, where the cargo was taken to the claimant's own country.

[3] "Eatenus utique licitum esse amicam navem sistere, ut non ex fallaci forte aplustri, sed ex ipsis instrumentis, in navi repertis, constet navem amicam esse . . . et inde discere, an quæ hostium bona in nave lateant" (c. xiv. pp. 188-9).

as captor—" . . . constat prædam quicunque ceperit, solius capientis esse, nisi ex præpositione et mandato aliorum ceperit";[1] this is an application of the general doctrine of principal and agent. When a prize is taken by one or more armed private ships, others being present but not assisting, the prize belongs only to him who has fought and conquered the enemy's vessel; but in case vessels of war are present, it is permissible to enact a different law.[2]

A few other questions are considered, such as piracy, the insurance of vessels liable to capture,[3] the authority of prize courts, whose judgment if manifestly unjust cannot be enforced, and the remedy by letters of reprisal;[4] and finally, the *De rebus bellicis*, a remarkable work of permanent value, the work of a sound legally-disposed mind, concludes with a wise reflection on war, and the frequently alleged "reason of State," that "monstrum horrendum, informe, ingens, cui lumen ademptum": "If governments will yield to that monster and indulge themselves by following its dictates and consider the property of other nations as their own, it is idle to investigate further the law of nations and discuss its principles."[5]

[1] C. xx. p. 199.

[2] Sir W. Scott held—the same principles being adopted in the French ordinances of January 27, 1706, and June 15, 1757—that mere presence in the case of a privateer is not sufficient to raise the presumption of co-operation in order to be entitled to a share of the prize (*L'Amitié*, 6 Rob. 261), but in the case of a vessel of war it was sufficient to support the *animus capiendi* (*The Flore*, 5 Rob. 270).

[3] C. xxi.

[4] C. xxiv. (cf. Treaty of Ryswick, Art. 9, and Treaty of Utrecht, Art. 16).

[5] C. xxv. p. 209.

THE *LAWS* OF PLATO.

[*Contributed by* EDWARD MANSON, ESQ.]

THE ideal, as Plato says, though it cannot be realised, may yet serve as a guiding principle, and the visionary cities which the idealists have built for us—whether it is the Republic of Plato or the Republic of Cicero, the Heavenly Jerusalem of St. John or St. Augustine's City of God, the Utopia of Sir Thomas More or the New Atlantis of Bacon—have all this merit at least, that they help to rouse us from the waking dream of custom and convention in which we pass our lives and compel us to reflect on the constitution of society, its true ends, its right methods—to ask ourselves, "Have we a civic ideal at all, or are we simply drifting on the surface of the stream of evolution?" On this subject no thinker is more stimulating or has exercised a more enduring influence than Plato. The "vision of the perfect State" as he saw it in the *Republic* may seem full of fantastic paradoxes, with its community of wives and property, its State adoption of children and its philosopher kings; but it remains a striking example of a well-reasoned attempt to grapple with social problems and to solve them in the light of the loftiest ideals, and to-day, when socialistic ideas are in the air, his speculations—the problems he pondered—have a peculiar interest. It is a splendid fallacy that of Burke, that you cannot examine the foundations of society without endangering their stability.

But we must read Plato in the spirit and not in the letter.

In contemplating his communism, for instance, we must bear in mind what inspired it—Plato's passionate desire for the unity of the State (*Rep.* 5, 462; cp. Arist. *Pol.* ii. 2-4). "If only those two small pestilent words *meum* and *tuum*, which have engendered so much strife among men and created so much mischief in the world, could be banished from the lips and thoughts of mankind, the dream of the philosopher would soon be realised. The citizens would have parents, wives, children, and property in common; they would rejoice in each other's prosperity and sorrow at each other's misfortunes; they would call the rulers not lords and masters but friends and saviours." But between the *Republic* and the *Laws* there is a wide gulf.

Plato's Visit to Syracuse.—A change has come over the spirit of Plato's dream. In the *Laws* he has quitted Nephelococcygia: he is "standing on earth, not rapt above the clouds," facing the questions of the State, not as a

visionary, but as a practical legislator. It is not difficult to account for the change. Plato had grown older by some ten years since he wrote the *Republic*, and he had come to see that his earlier conceptions, though he had not lost faith in them, were unattainable. The age was not ripe for such a society. But Plato had also passed through some personal experiences which had left a deep impress on his mind, and had brought home to him, among other things, the truth that human nature is far from being mere clay in the hands of the potter.

In 367 B.C. the elder Dionysius, tyrant of Syracuse—then at the height of its power and splendour—died, and was succeeded by his son, the younger Dionysius. Dion had been "guide, philosopher, and friend" to the elder Dionysius, and he continued the same to the younger. Dion was an ardent admirer of Plato, and he persuaded Dionysius to invite Plato to Syracuse and to listen to his schemes for an ideal State.

It was a golden opportunity which no philosopher could resist. It must have seemed the very realisation of Plato's dream—Absolute Power putting itself at the disposal of Philosophy. Dionysius under the influence of Dion was actually prepared to transform his despotism at Syracuse into a limited kingship—*τοὺς Συρακοσίους ἐπικουφίσαι, τὴν ἀρχὴν ἀντι τυραννίδος ἐς βασιλείαν μεταστήσαντα.* But the youthful tyrant was dissolute in his life, and Plato, true to his principles that the ruler must first make himself perfect, told him that he was unworthy to govern until he had undergone a thorough purification: "first go through your schooling, and then do all these things, otherwise leave them undone." A little worldly wisdom would have saved the situation, but Plato was not the sort of man to play Seneca to a Nero. The experiment closed in disaster. Busy calumniators were ready to persuade Dionysius that Dion was using Plato and his philosophic theories as a stalking-horse for his own ends, to supplant his master in the tyranny. Dion was seized and deported to an island, and no remonstrances on Plato's part could procure his recall. Plato returned, disillusioned, to Athens, and resumed his old life. Dion took up arms to vindicate his wrongs against Dionysius, and after some brilliant victories which made him master of Syracuse fell a victim to the dagger of the assassin.

This episode, in so quiet a life as Plato's, must have profoundly modified the philosopher's political views. As Solon said that "he did not give the Athenians the best laws, but the best laws which the people would bear," so Plato now in the *Laws* gives, not the best State as enshrined in the *Republic*, but "the second-best State." Instead of philosophic kings and guardians, we must be content with a body of written laws administered by magistrates and dicasteries. Instead of a community of wives, we must fall back on the old-fashioned institution of marriage; instead of a transcendental philosophy, we must keep the old gods of popular superstition and the established ritual of religion.

The Dramatis Personæ of the Dialogue.—The scene of the *Laws* is

laid in Crete, and the interlocutors in the dialogue are three, all old men —Megillus, a Spartan; Cleinias, a Cretan of Cnossus; and an Athenian stranger, who may be identified with Plato himself. The Lacedemonian, true to the Doric character, is a man of few words. So is the Cretan. Nearly all the talking is done by the Athenian. The Cretans, it appears, have determined to found a colony on a deserted spot at one end of the island, and Cleinias has been appointed one of the ten commissioners to draw up laws for the new colony. Here is an interesting situation, and the Athenian proposes that the three shall discuss the topics it suggests in the course of a walk from Cnossus to the cave and temple of Zeus under Mount Ida, and as the day is hot they can rest in the beautiful groves of cypresses and green meadows which lie on their way. Megillus will supply any information as to the laws of Sparta, Cleinias as to the laws of Crete, and the Athenian stranger is ready to explain everything that is connected with Athens and its institutions. Here, it may be noted, we have the comparative method brought into play with excellent effect, for devising the laws of the new colony. Persia and Egypt are also drawn into the argument. It is well to emphasise this fact—the survey of Greek and other systems—because it is sometimes supposed that Plato in framing his ideal State was trying to impose a purely artificial system—one might almost say a "literary invention"—on his imaginary community in total disregard of the principle that "constitutions are not made but grow." This is a mistake. Plato's State was founded on institutions which he saw actually existing in Sparta, in Crete, and in Athens. The syssitia or public mess-tables, the gymnastic training, the distribution of land, the status and disciplinary powers of the ephors—these and other Doric customs form the ground-plan of his design; but on this foundation he erects a superstructure drawn largely from the more liberal Athenian life with its art, its literary culture, and joy of living, and having thus taken the best elements from each he fills in and finishes the whole from his own shaping power of imagination.

Doric Discipline.—It is easy to see why Plato chose Sparta as his model. It was because in Sparta, with all its defects—its narrow ideals, its rigid military routine, its lack of art and literature, its ξενηλασία or inhospitality to strangers—he found that discipline of life both public and private which was the condition of the ideal State and alone could form the true citizen.[1] The city which Plato saw with the inward eye was a city not of conquest or of power: it was neither Hygeiopolis nor Plutopolis—"material prosperity can never—if there is anything in the witness of history—be the basis of a really great community";[2] it was a city dedicated to virtue or—because that word "virtue" has but a frigid sound—to the noble life.

[1] "In a Doric State," says Müller, "education was a matter of more importance than government."

[2] Wealth is to have the last place in Plato's State: vi. par. 697.

The whole mission of the State is to train men for this, and if it was to be achieved it could only be achieved by

> Self-reverence, self-knowledge, self-control:
> These three alone lead life to sovereign power,

and in Sparta Plato found the root of the matter. Here the citizen was trained in absolute devotion to public duty [1]—trained to endurance, hardihood, self-discipline: [2] here, if anywhere, the citizen

> Cared not to be great
> But as he served or saved the State.

The inscription on the grave of Leonidas and his three hundred at Thermopylæ—"Stranger, go tell the Lacedemonians that we lie here having obeyed their commands"—breathes the true Spartan spirit. It was the habit of discipline which gave the Spartan hoplite—the Greek Ironside—his character for invincibility, and inspired a confidence in him in the hour of danger which was felt in no other of the Greeks: and at the bottom of it was religion. The Spartan was pre-eminently "God-fearing" (Δεισιδαίμων).

On this point—the ethical basis of the State—Plato leaves us in no doubt at all. Everything else is subordinated to it. All institutions are of value only as they contribute to the noble life. The steady disciplining of life to the highest ends, culminating in the ὁμοίωσις τῷ Θεῷ—this is the central conception of Plato, and as an ideal it would be hard to find anything in the modern world to put beside it.

To the cynic, to the worldly-minded statesman, this ideal will, of course, seem the supreme paradox. But should we be far wrong in saying that as our modern civilisations develope, Plato's postulate of the necessity for a clearly realised ethical basis for society forces itself more and more upon us? Listen to the President of the United States speaking on this subject a month or two ago:

> Prosperity such as ours, necessary though it be as the material basis of national greatness, inevitably tends to undue exaltation of the merely material side of the national character; and we must largely rely on the efforts of such men and women as those I am addressing to build up the spiritual life, without which the material life amounts to nothing.
>
> As generation succeeds generation the problems change in their external shape; old needs vanish and new needs arise; but it remains as true as ever that in the last analysis national greatness, national happiness, national success, depend on the character of the individual man and the individual woman. We need good laws, we need to have these laws honestly and fearlessly administered; we need wealth; we need science and art and all the kindred activities that

[1] In Plato altruism takes the form rather of self-sacrifice for the good of the State than love to your neighbour: like Brutus—"not that he loved Cæsar less, but that he loved Rome more."

[2] A stranger had gone on a visit from Tarentum to Sparta, where he shared the black bread and the sour wine of the syssitia. On leaving he said to his host, "Now I understand why it is you Lacedemonians do not fear death. Life is worse than death with your *ménage*." There was a grain of truth in the jest.

spring from the clever brain and the deft hand. But most of all we need the essential qualities that in their sum make up the good man and the good woman; most of all we need that fine and healthy family life, the lack of which makes any seeming material prosperity but a glittering sham. If the average man is brave and hard-working and clean-living, if the average woman has the qualities which make a good wife and good mother, if each has self-respect, and if each realises that the greatest thing in life is the chance to do service—why, then the future of the nation is secure. We cannot stand up for what is good in manhood or in womanhood without condemning what is evil. We must condemn the man who is either brutal and vicious, or weak and cowardly; the man who fails to do his duty by the public, who is a bad neighbour, an idler, an inconsiderate and selfish husband, a neglectful father. So also we must condemn the woman who, whether from cowardice or coldness, from selfish love of ease or from lack of all true womanly quality, refuses to do aright her great and all-essential duties of wifehood and motherhood. We admire a good man, but we admire a good woman more. All honour is due to the man who does his duty in peace, who as a soldier does his full duty in war; but even more honour is due to the mother, for the birth-pangs make all men the debtors of all women. No human being has a greater title to respect than the mother who does her full duty, who bears and rears plenty of healthy children, so that there shall be national growth and not national decadence, so that in quality and quantity our people shall increase. The measure of our belief in, and respect for, the good man and the good woman must be the measure of our condemnation of the man and the woman who, whether from viciousness or selfishness or from vapid folly, fail to do each his or her duty in his or her special sphere.

Courage, unselfishness, common-sense, devotion to high ideals, a proper care for the things of the spirit, and yet also for the things of the body—these are the qualities that make up the right type of family life; and these are the qualities that by precept and by example we are bound to do all in our power to make the typical qualities of American citizenship.

The difficulties in the way of realising such an ideal are, of course, great. They are inherent in human nature, survivals from the primitive passions and instincts of self-preservation and self-gratification, which have been fostered by the long, fierce struggle for existence—what theologians call "original sin," the "natural man." Plato is fully sensible of such difficulties. He knows that man is a troublesome animal (vi. 777), that "the boy" is "of all wild beasts the most unmanageable" (*πάντων θηρίων δυσμεταχειριστότατον*).[1] He knows "the fatted beast,"[2] the idle luxurious, rich man. He sees the mingling in friendly intercourse of youths and maidens well-nurtured and with nothing to do but to attend festivals and dances, and asks himself how will they be saved from the temptations which beset them from the violence of passion.[3] But he does not, like the poet Gray, content himself with sentimentalising over these things. He has his remedy ready in an ever-vigilant training, a steady disciplining of nature, until, not by harshness or severity, but by constant habit, it becomes enamoured of whatsoever

[1] *Laws*, vii. par. 808.

[2] vii. par. 807.

[3] viii. par. 835.

things are pure, whatsoever things are lovely, whatsoever things are of good report. And this training must cover the private life as well as the public life of the citizen. "To imagine," says Plato, "that you can give laws for the public conduct of States and leave the private life of citizens wholly to take care of itself—to think that individuals may pass the day as they please, and there is no necessity for order in all things,"[1] this is a great mistake. The modern notion of freedom—to do what you like, or, as Mill expresses it, "to pursue your own good in your own way"—would have seemed monstrous to Plato. To him true freedom meant to "live by law," to fulfil the highest excellence of which the best part of you—the soul—is capable. Like St. Augustine Plato would have said, "Summa Deo servitus summa libertas."

The Model City.—This Model City—sketched for us in the *Laws*—what is it like, then? Let us take a view of it. The Cretans, says Cleinias, think of building it at some eighty stadia—nine miles—from the sea. "Good!" says Plato; "then there is some hope that your citizens may be virtuous. The sea is pleasant enough, but it has a bitter and brackish quality, filling the streets with merchants and shop-keepers—*colluvies gentium*—and making men unstable and unfaithful." Plato has his eye, of course, on the fickle seafaring democracy of Athens. Retail trading with its vulgarising influence is to be left to foreigners and metæci. The occupations of Plato's citizens are to be agriculture and the pastoral life, and for this purpose the country is to be parcelled out into 5,040 lots, corresponding to the number of the citizens—each lot being of a size sufficient to maintain a family of sober habits—the equivalent of our "three acres and a cow." The number thus fixed, 5,040 seems somewhat arbitrary; it is partly a mathematical fad of Plato's, but it corresponded roughly to the existing state of things at Sparta. This smallness of Plato's community must always be borne in mind in criticising his domestic legislation. The whole city is to be built on the heights in a circle, for the sake of defence and for the sake of purity; the temples to be placed all round the agora. This was, no doubt, borrowed from Athens or Syracuse; on the other hand, the city, like Sparta, is to have no walls. The spirit of its citizens is to be its best defence.

The lots distributed among the citizens are not to be alienable. Plato's object in this was evidently to prevent the state of things which had arisen in Sparta. There each citizen had originally one equal share, but as time went on inequalities arose, and in Plato's time there was no Greek State in which the contrast of poverty and riches was more striking than in Sparta.[2] In this provision of Plato's we may note, by the way, the beginning

[1] It is significant that the Greek word for the universe is Κοσμος—divine order, or regularity, anticipating our modern conception of the "reign of law."

[2] Wealth and poverty were both evils to Plato: the one corrupting the soul of man with luxury, the other driving him by pain into utter shamelessness (xi. par. 919).

of a principle which may now be found widely adopted in Canada, Australia, and New Zealand, under the name of the Homestead Acts—the principle that a man's homestead shall not be broken up, that it shall be sacred even from the claims of creditors.

The meals in the Model City, as in Sparta, are to be taken in public. The syssitia, in Plato's view, favoured security and temperance,[1] but why should not the women share them? At Sparta the girls shared the sports of the men, and to this physical training they owed their fine shape and fresh complexions,[2] but after marriage the women were left to their own devices, and it was whispered that their morals were not quite what they ought to be. This, then, is wrong; the legislator ought not to let the women live softly and waste money and have no order of life, while he takes the utmost care of the male sex. By so doing he leaves half only of life blessed with happiness when he might have made the whole State happy.

To carry out his scheme of government Plato provides a number of bodies. There are the Nomophulakes, or guardians of the laws, 37 in number, whose business is to see the laws executed. There is the Executive Council of State, 360 in number, sitting in sections, in session, 30 for a month each. There are the Warriors, who are to be second in honour in the State.[3] There are the Astyonomi, to look after the streets, roads, buildings, and watercourses; the Agronomi, to look after the country parts and "national defence." There are the Dicasteries, for the administration of justice. There is the Nocturnal Council, modelled on the Amphictyonic Council; and there are the Priests with the *exegetæ* or official interpreters of the responses of the Delphic Oracle. It would be waste of time to enter in detail into the constitution and functions of these various bodies. It is sufficient to say, that Plato's plan is to blend as far as possible the aristocratic and democratic elements in the State.

The Consent of the Governed.—But here, perhaps, the critic may intervene and say, But will you ever get your citizens to submit to this life discipline? Is it not impracticable, chimerical? Plato would have replied, "It is not impracticable because it has been actually realised in Sparta. There you have the spectacle of a virile people voluntarily submitting themselves to a system of the severest discipline, and not only submitting but glorying in its Lycurgan austerities."

"They have over them a law," said Demaratus, describing the Spartans to King Darius, "whom they fear much more than your subjects fear

[1] The taking of meals together was a common feature of mediæval life, and a strong bond of social union.

[2] The advantages of physical training for women are admirably illustrated in the graceful band of Danish lady gymnasts who have lately been seen in the Olympic games at the Stadium.

[3] War is a necessary evil. "The best legislator," says Plato, "orders war for the sake of peace" (i. par. 628).

you." In the history of mankind, and particularly in the history of the Church and its monastic institutions, we have abundant examples of the attraction which this idea of implicit obedience and loyalty to a great organisation possesses for a large part of mankind—for those who, in the language of Wordsworth's *Ode to Duty*, "feel the weight of chance desires" and "sigh for a repose which ever is the same." But the submission must be a submission willingly rendered; and acting on this principle, Plato, while claiming no divine authority for his legislation like Solon, Minos and Lycurgus, seeks to engage the assent of the citizens to his laws by prefixing a preamble or prologue to each law, explaining the reasons for it and emphasising the ethical or religious principles on which it rests. Bacon thinks this weakens the force of the law, and says "Lex a jussione incipiat." But shall we not rather here prefer Plato's view that "the laws of States ought to have the character of loving and wise parents rather than of tyrants and masters who command and threaten, and after writing their decrees on walls, go their way"?

Education in Athens.—But it is to the training of the young that Plato looks mainly for the success of his Model City. "All our evils in Church and State," said Bishop Hall, "have come from this—a too great neglect of children." Plato thought the same. The child is the centre of his teaching; and it is remarkable to note how to-day all the civilised nations of the world are following his lead: are concentrating on the child as *spes gentis*, legislating for its welfare, bodily and mental, in every sort of way, protecting its helplessness from ill usage, rescuing it from bad associations, providing free meals for the hungry, training its intelligence by object-lessons, and if it does wrong saving it—by Children's Courts—from the contamination of the common criminal. In designing his scheme of education, Plato draws freely from what he found existing at Athens. What this education was is sketched for us by Mr. Bosanquet in a suggestive little book on the *Republic*. A Greek citizen's son in the best age of Greece was taught reading and writing, a little practical arithmetic, and perhaps the elements of geometry; he was taught to sing and to play a simple stringed instrument (the lyre), and—this is what strikes us as exceptional—he was instructed in dancing and in very various athletic exercises by a special teacher, whose lessons he attended no less regularly than those of his other masters and for quite as many years of his life. This primary education—διανοητική, μουσική, γυμναστική—occupied the Greek boy from seven or eight till fourteen or sixteen. There was more in it than there might seem to be. The boy learned to read and recite the Homeric poems—those ancestral classics of the Greek race. His taste was trained by being thoroughly familiarised with the older and accepted forms of music—a very simple music, something like our old ballad or hymn tunes—and his dancing was the poetry of motion, rhythmic, symbolic, dramatic, not unlike what is captivating the world

to-day in Miss Maud Allan.[1] The Greek did not leave physical training to chance, as we do in our modern sports. It was methodical, systematic, scientific. It was closely allied, too, to the training for arms. At seventeen or eighteen the Greek youth was enrolled in the "Ephebi"—corresponding to our cadets corps—and in that capacity had garrison and patrol duty assigned him and a certain place and importance at public festivals. The oath of the Ephebi breathes a fine civic and patriotic spirit:

> I will not dishonour my sacred arms; I will not desert my fellow soldier by whose side I shall be set. I will do battle for my religion and my country, whether aided or unaided. I will leave my country not less, but greater and more powerful than when she is committed to me. I will reverently obey the citizens who shall act as judges. I will obey the ordinances which have been established, and which in time to come shall be established by the national will, and whosoever shall destroy or disobey these ordinances, I will not suffer him, but I will do battle for them whether aided or unaided; and I will honour the temples where my fathers worshipped: of these things the Gods are my witnesses.

Plato's Educational Methods.—In the *Laws* Plato takes the existing system and moulds it to his ideal ends. The child is to be taught to love the best. Education is not—as with us—a mere intellectual process, so many "subjects" for examination, but a moral training comprehending the whole life. It must begin at the earliest possible moment—even before birth. When only three to four years of age, the little ones are to be taken by their nurses to play near the temples, so that they may learn religious awe. The very play of the child is to be utilised. Here we have an anticipation of the "Kindergarten." The young are to be brought up in happy surroundings out of the way of sights and sounds which may hurt the character or vitiate the taste. They are to live in an atmosphere of health. The breeze is always to be wafting to them the impressions of truth and goodness. For this ideal we to-day look mainly to the home life. But the sentiments current among us as to "lessons learnt at a mother's knee," or "the hand that rocks the cradle rules the world," would not have appealed to Plato. The woman he held to be a "bad educator," and probably he was quite right so far as the Athenian mother was concerned, living as she did in a condition of semi-oriental seclusion. The State, therefore, must take her place and train the neophyte. Music, choral song and dance,

[1] "With no movement of voice or hand or foot, παραλειπόμενον, left unconsidered," says Mr. Pater (*Plato and Platonism*, p. 205) "it was the perfect flower of that minute patience and care which ends in a perfect expressiveness: not a note, a glance, a touch but told obediently in the promotion of a firmly grasped mental conception, as in that perfect poetry or sculpture or painting in which 'the finger of the master is on every part of his work.' We have nothing really like it, and to comprehend it we must remember that though it took place, in part at least, on the stage of a theatre, was in fact a ballet dance, it had also the character both of a liturgical service and of a military inspection: and yet, in spite of its severity of rule, was a natural expression of the delight of all who took part in it."

these we must have, and they must be for ever chanting to the young the same strain—that "virtue is happiness."[1]

This insistence of Plato, in common with the Greeks, on music, dancing, and song as an essential part of education strikes us as rather remarkable. The virtue Plato found in it was in its power of disciplining the emotions, just as he found in the Spartan system the discipline for the body. To Plato, as to Pythagoras, music was the essence of things. In his *Music and Morals*, Mr. Haweis tells us that we have "soul atmospheres," and these "soul atmospheres" music has the power of evoking and manipulating. What capacities then for good or evil must music possess! Shakespeare, Milton, Dryden, Collins have all paid exquisite tributes to its soul subduing power. We know how Saul's "dark hour" yielded to the harp of David.

In the "musical drill" of our own Board Schools, and the drill and band parades of such organisations as the Boys' Brigade and the Church Lads' Brigade, we may note Plato's idea taking shape among ourselves. But what Plato is specially solicitous about is that the young, and indeed all the citizens of his model State, shall see and hear only what is best in literature and art, in music, dancing, and song, that all that tends to deprave shall be kept from them: otherwise it will neutralise all the benefit of that training. There is much that is good in the poets, but there is bad too. The "theatrocracy" have vulgarised the stage, and this licence of bad taste has spread to everything.[2] We know something of that in the England of the twentieth century, with its flood of cheap, trashy literature and music-hall vulgarities. Therefore there must be a censorship. The tunes must be tunes consecrated by custom and ancient virtue, not modern innovations,[3] not the soft Ionic or Lydian measures. They must be such as give "a wholesome discipline in a pleasant form": for men the manly, for women those that breathe of temperance and modesty. Dancing, again, has its dubious side. A modern has classified it under three heads—the graceful, the ungraceful, the disgraceful. The Bacchic sort, in which drunken men, satyrs, and nymphs, and Pan and Silenuses figure, must be proscribed. Plato, with his eye on the comic stage of Athens, had good reason for this proscription. In judging of the feasibility of his censorship we must again remember that Plato's Model City is only the size of a small modern municipality, and that the by-laws of such a municipality, both in England and still more in Germany, do in fact regulate nearly as many matters as ever Plato in the *Laws* claims to control. In Shakespeare's time players coming to a town had to get licence for their public playing by acting first before

[1] ii. par. 664.

[2] *Νῦν δὲ ἦρξεν μὲν ἡμῖν ἐκ μουσικῆς ἡ πάντων ἐς πάντα σοφίας δόξα καὶ παρανομία συνεφέσπετο δὲ ἐλεύθερια.*—*Laws*, iii. 701B.

[3] Sparta forbade the innovations in the national music made by the poet Timotheus, and destroyed the four strings which he had added to the established seven of his lyre.

the mayor. It was indeed at one of these performances at Stratford-on-Avon before his father, then mayor, that the poet saw his first play at the age of five.

The Relation of the Sexes.—This is one of the most difficult and delicate subjects for the legislator of the Model City, as indeed it still remains after two thousand years. The restrictions on wealth, the discouragement of that disease "luxury"—in a word, the simple life—will do a good deal to check licentiousness, so will the watchful eye of the rulers; but sentiment—a holy horror of vice—will do more. We have as it is the example of brothers and sisters living together without the thought of evil entering their minds; we know how an audience in the theatre shudders at an Œdipus or a Thyestes. Why? Because "every one from his earliest childhood has heard men speaking in the same manner about them always and everywhere." What we have to do then is to consecrate this sort of tradition, this unwritten law. Here we have something not unlike the idea of the Christian brotherhood and sisterhood. Then, again, we have the example of those who train for the Olympic games. They submit to the hardest discipline, forgo all the pleasures of life. Now they do it, says Plato, anticipating almost the very words of St. Paul, to obtain a temporal crown; but we an incorruptible—the crown of the noble life. But the chief safeguard of social morals is marriage. The community of wives which would make the whole State one great family is impracticable: so the next best thing is marriage. The age for marriage is, for the young men, from twenty-five to thirty-five, for the maidens from sixteen. Every man must marry before he is thirty-five, otherwise he is to be fined and disgraced. The choric festivals and dancing together will afford the young people plenty of opportunities of meeting and of making their choice. There is nothing to prevent marriage being a matter of inclination. We thus get that blend of diverse qualities which Nature aims at, and which is so desirable in marriage; but in making their choice the paramount consideration for the lovers must still be the welfare of the State. There is to be no marrying for money. Dowries are neither to be given nor received. Reverence, not riches, is what parents are to bequeath to their children. Once married, husband and wife, who are to have a separate house, are to be all in all to one another, "giving all their mind,"[1] as Plato expresses it, to providing the State with the best and fairest specimens of children they can.[2] To secure mutual faithfulness and good behaviour on the part of the spouses, Plato constitutes a censorship in the shape of a "Vigilance Committee of Matrons," who are to meet daily at the Temple of Εἰλείθυια and report.

Eloquent as Plato is over the affinity of souls and their union, he never rises to the conception of marriage in its highest aspect, as the perfect bond

[1] vi. par. 783.

[2] Plato would have been in complete accord with the apostles of Eugenics, in discriminating the civic worth of offspring and denouncing "race suicide."

of love and sympathy between man and woman; it was impossible that he should, looking at the inferiority of the Greek woman of virtue as distinguished from her brilliant rival of the demi-monde, the Hetaire. For him marriage is mainly to provide the State with well-formed and well-dispositioned children. Yet he is far from indifferent to the domestic virtues. Master and mistress must set an example to their household in the matter, for instance, of early rising. The mistress must not be awakened by her handmaidens, but must herself awaken them. It is a striking proof of Plato's wisdom that he dwells strongly on the superiority in education of example to precept.

Criminal Law.—With our careful system of training the young, there ought to be no such thing as crime in the Model City. Plato even feels a sense of shame in touching on it; but we must do so remembering that we are not legislating for heroes and demigods, but for erring mortals. The worst kind of crime, as being a sin against the gods, is sácrilege—it almost argues madness. The next in heinousness, as being a crime against the constitution, is treason, plotting against the State. The other crimes, homicide, theft, assault, spring mostly from two passions—ambition and avarice—"auri sacra fames," which tyrannise over the soul. They can only be really cured by exorcising these passions, but meanwhile we must repress the crimes to which they lead —for no criminal must be suffered to escape,—fitting as far as we can the penalty to the crime. Thus we must distinguish between crimes which are involuntary and crimes which are wilful, between attempts to commit crime and their consummation, between crimes committed against parents or brothers or sisters and crimes committed against ordinary citizens or slaves, and so on, always remembering that punishments should not be vindictive, but aim at the reformation of the offender. Here it may be noted Plato lays down a principle which we, in this year of grace 1908, are only just beginning to appreciate and put in practice. Pity for their unrighteousness is the feeling which predominates in Plato's mind towards offenders other than the hardened and the irreclaimable. And what of him who slays "his own best friend"—what of the suicide? The penalty for such unmanliness is to be buried in some wild and nameless spot, with no column or inscription to mark the place of his interment. So far is Plato from condoning, as he is sometimes thought to do, the crime of "self-slaughter"!

The Religious Basis of the State.—Plato, it is scarcely necessary to say, had a profoundly religious mind. Religion underlies his whole theory of the State. Our earthly citizenship is but a state of probation for a higher and holier citizenship—*πειρᾶσθαι χρὴ ἐνθένδε ἐκεῖσεν φεύγειν ὅτι τάχιστα*—and the noblest in his estimation of all the prologues of his laws is that which demonstrates the existence of the gods and that they are our allies in the great conflict which is going on between good and evil. He cannot contain his indignation with the materialists of his day who see nothing in sun, moon, and stars, but earth and stones only, can hear no music of the

spheres, and degrade the soul to a property of matter. The words of Cato's soliloquy aptly sum up his argument:

> If there be a God—
> And that there is all Nature cries aloud
> Thro' all her works—He must delight in goodness,
> And that which He delights in must be happy.

The wonders of Nature and the consensus of men are incontrovertible evidence of the reality of religion. He does not envy those who can see the mothers in the temples praying earnestly for their children and think it is all a myth.[1] To the young and the light-minded, misled by the sophistries of the materialists, he can only say "Wait; you are young." True, the old religious myths and many of the stories of the gods are unedifying, but we must not be severe on them, because they are ancient. We must try and breathe a new spirit into them. Impiety must be punished, but the real penalty of irreligiousness is moral degradation. "If you become worse, you wilt go to the worse souls."[2]

Plato and the Church.—Plato's Model City has never been realised in any political community, but it has found a remarkable parallel in the mediæval Church. Like Plato's city, the Church is the type of something more perfect in the heavens: like Plato's city, its end is ὁμοίωσις τῷ Θεῷ. Like Plato, the Church—at all events in primitive times—sought to attain unity by having all things in common. The guardians of Plato's State and the citizens correspond to the clergy and laity of the Church. Like the clergy, the guardians are to illustrate the higher life. The warriors of Plato's community may not inaptly be likened to the military religious orders—the Knights Templars, the Knights of Malta and St. John of Jerusalem, who dedicated their swords to the service of the Church. The Canon Law, with its supervision of private life and its code of penances and expiations, has much in common with the regulations of Plato's Model City. The Church had this advantage over the Platonic conception—that it could point to an ideal life actually lived. But the Platonic conception has this advantage over the Church—that it is free from the darker traits of mediæval Christianity, those Dantean pictures, those terrible doctrines which under the influence of superstition and bigotry have

> Drawn like eclipse
> Darkening the world.

Life in Plato's city is to be one of brightness, of joyousness. Virtue is to beget happiness.

Political thinkers, political teachers have their day and cease to be. Machiavelli and Guicciardini, Hobbes and Locke, Burke and Hume,

[1] x. par. 887. [2] x. par. 904.

Rousseau and Voltaire, all these in turn served their age, but the tide of evolution swept by them and left them stranded on the shoals of Time, historical landmarks. Plato survives as fresh to-day as ever, and the secret of his vitality is that he is always faithful to imperishable ideals —the true, the beautiful, the good.

FRENCH AND ENGLISH LAND LAW.

[*Contributed by* JAMES EDWARD HOGG, ESQ.]

THE New Hebrides Convention with France, entered into formally on October 20, 1906, and the correspondence relating to it, some time since published as a parliamentary blue-book, have already been the subject of a good deal of comment in the Press. The whole episode bids fair to become an important event in the history of the relations between the Home Government and the dominions beyond the seas. Many morals have been pointed, and these will almost certainly have practical results in the sphere of inter-Imperial politics. There is, however, an important moral to be drawn, by all parts of the Empire under the English common law, which should rouse public opinion to the necessity of an alteration in the form of the law relating to ownership of land. Some parts of the Empire have a land law based on principles differing altogether from those of the English common law; for instance, the province of Quebec in Canada, Ceylon, and all the South African colonies. It is not, of course, necessary to adopt the Roman-Dutch law, or any other system, in order to make our own land law more suitable to our own needs, but the process of improvement may be rendered easier if we pay some heed to other systems, and notice some of the points in which these differ from our own system.

The desire for a "settlement of disputes with regard to land claims in the New Hebrides" (Letter of September 22, 1905, Corresp. No. 1) was the prime cause of the Convention being brought into existence (Letter of March 9, 1906, Corresp. No. 17, par. 6), and throughout the correspondence the land question is recognised as being the most important, and the most difficult, of all the questions dealt with by the Convention. The divergence between French and English law is wider in the sphere of land ownership than in almost any other part of the two systems of jurisprudence, and the root of the difficulty experienced by the representatives of the two Powers in coming to an agreement lay in the impossibility of stating rights to land under English law in the French language, though rights to land under French law can be stated in the English language with much less difficulty. The reason for this difficulty in stating English land law in the French language is that our English land law says (or is supposed to say) one thing in theory, and another thing in actual fact. Theoretically,

the law of England relating to the principles of land ownership has not been changed since the time of William the Conqueror; in actual fact, but at the expense of a great deal of trouble and waste of time and money, we do manage to own land and sell and mortgage it in accordance with the business requirements of modern life. The result, however, of this conflict between theory and fact has been singularly unfortunate in the present instance; an agreement between France and England has been made very difficult, and the meaning of some of the terms of the Convention as it stands is by no means clear, whilst it is almost certain that the difficulty of ascertaining what is meant, and applying the terms of the Convention when its meaning is ascertained, will make the whole scheme unworkable.

The theory on which the whole of the law of ownership of land in England, and in countries which have the common law of England as part of their legal system, is based, is that no subject of the King of England can "own" land in the same way that he can own things like cattle, tables and chairs, money in the funds, etc.; whilst money and movable property is the absolute property of the owner, land can only be "owned" by being "held" for some definite period or in perpetuity, and it is only the King who is supposed to "own" the land in the sense of being entitled to it when his subject's "estate" in it comes to an end. The origin of this notion is to be found in the feudal system of the middle ages, when lands were granted to vassals to "hold" of the lord on condition of performing certain services or paying sums of money. The theory implies, of course, that the King is in a sense the landlord as well as the ruler of the country, and is simply a survival from the times when a conquering chieftain did actually have the right to dispose of all the land as well as govern his dominions. In actual fact, land in England is ordinarily said to be "owned" when held in perpetuity, and the distinction between being owned and only "held" under the King is for practical purposes neglected, both in Acts of Parliament and judgments of Courts of law. However, no Act of Parliament has abolished this kind of "tenure" of land, and it remains as a sort of empty shell or fiction, of no practical use, and extremely apt to lead to confusion—as the New Hebrides Convention shows. In contrast to this theory of land ownership, the theory in French law (based on the Roman law) is that land may be "owned" like any other property, only differing from cattle, money, etc., in being "immovable." There is no question in French law as to the President of the Republic, or the Republic itself, having any property rights in land owned by a citizen of the Republic. Under French law a private person may acquire a piece of land without any question arising as to any past or future rights of the Republic in it; under English law the same private person could only acquire the same piece of land as part of the land that was once the property of the King, and might at some future time again

become the King's property. What wonder that "it was only with the greatest difficulty, and after the most exhaustive discussion, that the Commission succeeded in coming to an agreement on this subject"! (Letter of March 9, 1906, Corresp. No. 17, par. 15). The discussion, it appears, began with the 9th line of the preamble, as may be seen on turning to the text of the Convention and the explanation contained in the Letter of March 9, 1906 (No. 17).

The preamble states that the two Governments have agreed on the Articles of the Convention "in order to secure the exercise of their *paramount rights* in the New Hebrides," the French text being: "en vue d'assurer l'exercice de leurs *droits de souveraineté* aux Nouvelles-Hébrides." The letter of March 9, 1906 (No. 17), from Lord Elgin to the Governor-General of Australia, has this passage (par. 8): "The preamble definitely asserts the *paramount rights* of the two Powers in the New Hebrides . . . without giving either Power any preponderance over the other. In this connection I may explain that the English phrase '*paramount rights*' in the preamble was selected because the literal equivalent of the French phrase, viz. '*rights of sovereignty*,' would have been unsuitable as implying in English law *ownership of the soil*." The consequences of this phraseology and explanation might be serious, and can hardly have been foreseen. Had the phrase "rights of sovereignty" been used, it would have been easy to add a clause stating that governmental and not proprietary rights were intended, though even this would hardly be necessary, since it is extremely doubtful whether the technical and shadowy "ownership" thought to be implied by the word "sovereignty" could be implied with respect to territory which it was the express purpose of the Convention to keep outside the British dominions. As it now stands the preamble does not assert (what it ought to assert) that His Majesty's Government has rights of sovereignty in the islands. On the assumption, however, that Lord Elgin is correct in thinking that "rights of sovereignty" would give to the King of England some "ownership of the soil," the matter is still worse. For in the absence of those "rights of sovereignty" which the Convention is so extremely careful to confer on the Republic of France and not on the King of England, no British subject could *under English law* acquire ordinary freehold ownership of land in the islands, though a French citizen might acquire full ownership under French law in respect of the same piece of land. The necessity imposed on British subjects to own their property under English law arises under Article 23 (1), by which in "land suits between non-natives" the Joint Court provided for by the Convention is to "be bound by the laws of the defendant's country." Thus, if a Frenchman were seeking to recover a piece of land in the possession of an Englishman, the Englishman (the defendant) would have the advantage certainly of having English law applied to the case, and as defendant he would have the further advantage of actual possession;

but such a defendant could not show a title to the land as freehold land under English law, for the very instrument which imposes English law on him denies to him the possibility of having a fee simple estate, since the possession of a fee simple estate implies in English law a grant at some time or other from the King or Queen of England, and the possibility of any such grant has been excluded in the most careful manner by the terms of the Convention!

The whole scheme, in fact, relating to title to land raises a series of the most intricate and difficult conundrums. It would be an extremely arduous undertaking to formulate any workable scheme by which the same piece of land might alternatively have applied to it one of two different systems of foreign law. When these two different systems are French and English law respectively, the task is for practical purposes impossible.

Provision is made for the registration of titles to land, and it might perhaps be thought that this solves the difficulty suggested. But, in truth, an examination of these provisions leads to the discovery of still further difficulties. No registration can be of more than limited utility until the general principle is settled as to the basis on which title to the land rests. Either a piece of land must be owned absolutely as under the French law, or it must be held in fee simple—*i.e.* owned as freehold land—as under the English law; a third possibility, of course, would be for a new system of ownership to be established, but this is not done. Land cannot be owned one day under one system, and the next day under another system, and if the proper system is not settled, the mere registration is of little use. A few special difficulties disclosed by the registration provision may be referred to. French law knows nothing of what is called a "deed" in English law; yet "titre" and "title-deed" are assumed in Article 26 to be corresponding expressions in the two languages. "Titre" is also translated by "title," and this double use of the English word "title," coupled with the difference between the two systems as to "deed," must produce confusion. Again, in Article 25 (2) a copy of an entry in the land register after a judgment by the Court "shall constitute a *conclusive* title to land"; the French word is *définitif*, which would seem to mean no more than "complete." A "complete" title in English law might, however, not be "conclusive."

The Convention then appears to have attempted an impossible task. The lesson to be drawn from the certain difficulty, and possible failure, of this attempt to provide a tribunal for settling land claims in the New Hebrides is the immense superiority of French land law with respect to its form; if a new code of law had to be devised for the islands' land there would be infinitely less difficulty in drafting one on the basis of French law than on the basis of English law. This is by no means due to any inherent superiority of French law with respect to its matter, for English law—whether in the branch of land ownership or otherwise—has little fear of comparison with other systems; it is simply the *form* of the law of land ownership which

is archaic, and therefore troublesome and in need of reform. Particularly may we say of the English law of ownership of land what Lord Bacon said of the laws of England generally: "I have commended them before for the matter, but surely they ask much amendment for the form." And nothing but the driving force of public opinion will bring about this amendment.

THE INDIAN CODE OF CIVIL PROCEDURE.

[*Contributed by* Sir Lewis Tupper, K.C.I.E., C.S.I.]

In this paper I propose to continue the narrative begun by an anonymous writer in the issue of this Journal for December 1907.

The Bill passed.—The Bill to amend the Code of Civil Procedure was passed by the Legislative Council of the Governor-General of India on March 13, 1908. It will not, however, come into force till January 1, 1909, so that the legal profession and others interested will have ample time to study its provisions. As will appear below, a very large number of the judicial and executive officers of Government must have already become sufficiently familiar with the new Code.

The Code is a Record in Comparative Legislation.—In his final speech moving that the Bill be passed, the Hon. Mr. Richards, the Law Member of Council who has had charge of it, made some remarks of so much weight and interest that they are well worth quoting at length. With a sigh of relief now that the measure had reached its final stage, he said:

> For the past seven years [the Bill] has stood on the List of Business of this Council, it has been considered by four Committees, it has been published and circulated three times, it has been the subject of copious criticism by the public and by the profession. But in defence of this I would point out that the Legislature has not often been troubled with a general amendment of Civil Procedure. The first Code was passed in 1859; it was amended and re-enacted in 1877; and though it came again before the Legislature five years later, the Act of 1882 was in substance no more than the Act of 1877. It is therefore more than thirty years since the last Code was discussed in this Council, and much has happened in those years to warrant a fresh enactment. A mass of decisions has grown up round the present Code which should be removed, and many points of conflict have arisen between the various High Courts which should be set at rest. Moreover, the English practice, on which the Act of 1877 was based, has itself been remodelled since that year as the result of experience, and we should take advantage of that experience. It is full time therefore that a new Act should be passed, and if excuse were wanted for the deliberation with which we have proceeded in enacting it, I would remind the Council that these two Codes of Procedure of ours, the Civil and the Criminal, are big things. They stand alone in the records of comparative legislation both in regard to the extent of the population which they affect and to the number of Courts to which they apply. They govern the litigation of the people of British India, some three hundred millions in all, and they regulate the procedure of over two thousand Courts. It is wise therefore to proceed cautiously in effecting a change in them.

Method of Legislation in India.—In this conclusion all will agree: fortunately it is operative. In India the methods and machinery of legislation differ widely from those to which we are accustomed in this country, but they are distinguished by the note of extreme care. It is probably for this reason that Indian legislation has on the whole succeeded well. The Procedure Bill was perhaps an extreme instance of elaboration in preliminary discussion; but in principle there was nothing exceptional in what was done: it is the usual course when it is proposed to pass measures of importance affecting the country at large to circulate the Bills for opinion to all local governments and administrations and to the High Court of Calcutta. The local governments in turn consult not only the Provincial High and Chief Courts, and through them their principal judicial subordinates, but also the leading executive officers. The Bills are published in English in the *Gazette of India* and in English and in the vernacular languages in the local *Gazettes*. Any person or association wishing to express an opinion on a published Bill can address in writing the Secretary to the Government of India in the Legislative Department. The same system of circulation is adopted, *mutatis mutandis*, in the case of Bills affecting only a part of the country or one or more departments of Government; as also by local governments in dealing with Bills introduced in local legistatures, the principle being that practically every one in the country whose experience or official position qualifies him to express an opinion on a pending Bill can either make his own opportunity on perusal of the Bill in the *Gazette*—a thing not often done—or is officially invited or required to submit his opinion. The record thus becomes very voluminous; and it is when it has been compiled in this way that the real work of oral debate begins. This happens not at a meeting of the Legislative Council, but in Select Committee. It would not be quite true to say that there never is a real debate at any meeting of a Legislative Council, but it is quite true that at such a meeting a real debate is a rare exception. An Indian Legislative Council is altogether unlike the House of Commons. The Indian members are few; they are chosen in a different manner; they speak seated; they almost always read their speeches; I was about to add that the main result is invariably a foregone conclusion, but with overwhelming party majorities this point of difference fails. The great advantage of the so-called debates in Council is that they set before the public and preserve, as an accessible record for legislative history and as a basis for future administrative and legal progress, well-considered statements by highly competent authorities of the main provisions of the measures in hand, of the reasons for their proposed enactment, of the objections raised, of the grounds for rejecting the objections or of the expedients by which they have been met. With this advantage, we need not regret that the meetings are usually much more remarkable for an almost extreme form of decorum than for any animation in debate. But the ceremonious urbanity of the Council-room

will in no way chill those who know what has passed before the stage of the Council-room is reached.

The voluminous opinions when complete—or nearly complete, as there may be some defaulter whose opinion is received only barely in time for consideration—are referred with the Bill to a Select Committee which meets as often as necessary until it has gone through the whole Bill and revised it. The task of examining the opinions is most laborious; but it is most conscientiously performed, and my own experience certainly is that members of Select Committees are most vigilant. If one member has missed a point, another has noted it; and I do not think that in these discussions any matter of importance is either forgotten or ignored. In Select Committee the Bill is read out section by section, and each section is adopted with or without amendments. There is not exactly a debate; as each section is read no one says anything unless he has something to say which really requires the attention of his colleagues. When a section is discussed there is a rapid conversation of an informal kind, and certainly no one could complain of any want of animation in these discussions. If I may again refer to my own experience, it is that every member of Select Committee states his real opinion with extreme frankness, just as if he were expressing it in private life. When the examination of the Bill in this way is finished, the Secretary in the Legislative Department, who attends the meetings, prepares the Report of the Select Committee, which is signed by all members unless any of them dissent. Dissents are rare and are usually confined to a few specific points, the free exchange of views in Select Committee resulting in most cases in complete unanimity or in a fairly close approach to it.

Progress of the Bill since last September.—I have explained all this procedure so that the next items in the narrative of the Civil Procedure Bill may be understood by those who are unfamiliar with the practice of Indian legislatures. About three months before the previous article on the present subject appeared in this Journal the Bill was circulated for opinion to the local governments and the Calcutta High Court. On January 17 last the Bill, with the correspondence received up to date, was referred to a Select Committee. The Government of Madras was the only defaulter and sent in its contribution in two instalments on January 20 and January 27. The Select Committee, with commendable promptitude, submitted their report on February 12. Unlike the Committee on Sir Thomas Raleigh's Bill, they were unanimous. I hope I have made it clear how much is implied in this dry epitome of official action. Speaking of the usual practice, at any rate of the last ten years, and without any prophetic anticipations of what may occur now that educated Indians have more and more come to learn the arts of agitation, I may say generally that in India circulation for opinion and discussion in Select Committee takes the place of deputations to ministers, public meetings of protest or approval, the debates in the House of Commons—of most, in fact, of the turmoil of eager and vociferous associa-

tions or crowds or individuals which is in part the preliminary to the passing of laws in that assembly. If the debates in the Legislative Councils have any analogy in this country, it is that of debates in the House of Lords; but the analogy, if any, is at most a faint one. I should perhaps add, to prevent misapprehension, that the Indian Select Committees differ materially from the Select Committees of the House of Commons. The Indian number of members is smaller, usually not exceeding five or six; and the Indian Committees do not summon witnesses or take evidence. They have to rely on their own knowledge and experience and on the opinions elicited by the circulation of the Bill, which it is their special duty to master and utilise.

Incidents of the Final Debate.—In the course of the placid delivery of set speeches which culminated in the unanimous adoption of the new and immensely important Civil Procedure Code there were two or three incidents sufficient to remind the observer of the varied history of the vast Empire to which the Code will apply, of the changes—exceedingly rapid changes if their pace be measured in terms of the duration of kingdoms and empires—which have been due to British supremacy, and of the widespread complexity of ideas and feelings, of religions and customs, which make up a considerable part of the actual psychological condition of the polyglot and multitudinous races of the land.

Speech of the Tikka Sahib of Nabha.—One of the speakers was the heir of the Raja of Nabha. The picturesque figure and courteous manners of the Raja are well known in Northern India. He is a chief of the old school. He knows no English. He is devout in the Sikh religion. He is conspicuously loyal to the British Government. To meet him is to recall the days—not so very long ago in historic time—when the Delhi Empire fell to pieces, when the Sikh predatory bands overspread the country between the Sutlej and the Jumna, when in that tract there was not even any mimicry of sovereignty except such as was immediately derived from recent violence and terrorism. Indeed, long after the British Government had with a protecting hand waved back the rapacity of Ranjit Singh, who meditated the absorption of the Cis-Sutlej chiefships, that part of the country was perhaps even more full of turbulence and anarchy than is now the confused mountain tract on the North-West Frontier between the British administrative border and the Durand line. Ranjit Singh died in 1837. Some eighty years later we have the representative of a chief whose predecessors were saved by the British Government from annexation by that remarkable despot critically discussing in the Legislative Council of the Governor-General a Bill to amend the Code of Civil Procedure. The contrast is great between then and now, and of a kind not to be forgotten in days when we have to deal with the extremely serious problem popularly described—and very euphemistically described—as "Indian unrest." If some misguided Indians imitate Continental anarchists, there are others with a greater stake in the country, and

a much firmer hold upon the imagination of the peasantry, upon whom we can rely.

One point taken by the Tikka Sahib (to give him his Indian designation) was a curious one. The Code exempts from attachment and sale in execution of decree "such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman." The Tikka Sahib was not satisfied with this provision. He represented that there was no religious usage on the point except amongst Hindus; but that women of other religions might be bound to keep these ornaments by a rule of custom as strong as a rule of religion. The Code was not altered; no reply was made to his argument; the provision stands. I think the decision was right. To admit proof of custom as distinguished from religious usage on such a point would open a wide door to false evidence and might tempt debtors to load their wives with jewellery in fraud of their creditors. The question would arise, where fashion ended and custom began. But the juridical interest of the Tikka Sahib's remarks lies in the implied query—where, in societies whose civilisation is less advanced than our own, are we to draw the line between religion and custom? I should widely overstep the limits of this paper if I were to take up that theme; but I may perhaps say that the evidence with which I am at present acquainted leads me to suggest that custom really precedes religion properly so called: that there are rules of conduct and rules regulating some of the chief relations of individuals to each other before myth and magic have crystallised into a creed; that religion, when attained, may dominate society and a rule of custom become indistinguishable from a rule of religion; and that with the severance of law from religion, which is one of the concomitants of progress, the archaic separation between custom and religion, or what takes its place in savage tribes, is re-established.

Amendment proposed by Dr. Rashbehari Ghose.—In an earlier stage of the discussions on the Civil Procedure Bill the Hon. Dr. Rashbehari Ghose proposed a clause to enable two or more persons interested to apply, subject to certain formalities, to a Civil Court for an order requiring the trustee of a trust created for public purposes of a charitable or religious nature to supply a detailed account of the receipts and disbursements in connection with the trust property for a period not exceeding three years next preceding the date of the application. The Bill already gave power to the Courts to direct accounts when once a suit had been instituted; but it is not easy to know whether there has been such a breach of trust as could form the solid foundation of a suit until the accounts are available for investigation. Dr. Rashbehari Ghose's clause was circulated as part of the Report of the Hon. Mr. Richards's Select Committee of August 1907; and I am not at all surprised that it elicited a considerable amount of support. Suppose an institution—a kind of monastery—where a public kitchen is kept, doles are given to the poor, travellers are lodged and fed, and worship is performed; before British rule began the lands around had been given in *jagir* by the

raja of the day to the head of the institution; that is to say, without disturbing occupancy or altering any proprietary title, the Government share of the produce in cash or kind had been alienated in his favour. It would have been understood that he was to use the proceeds for his own support as well as for that of the charity. It happens that the head of the institution becomes corrupted; he is a spendthrift, a drunkard, a debauchee; the proceeds of the *jagir* are squandered, the charity is starved. His own people will not tell tales; the peasants, unless led, will hang back. Certainly those who have the courage and public spirit to attack the evil deserve all possible support. The decision of the Government is to omit the clause from the Code, but to permit Dr. Rashbehari Ghose to introduce a separate Bill to give effect to his views; and his Bill will be published and circulated. At present Government do not commit themselves to approval or disapproval of the proposal. They hold that the question is one for the communities interested and that it has not yet been fully discussed by the leaders of these communities. Here again the decision seems to me to be proper. The local governments will be heard; and they will be able to consider the evidence which their district officers can supply as to the actual facts connected with the management of religious and charitable institutions in different parts of the country. Such evidence could not be collected or digested as a mere part of the preparation of an elaborate and comprehensive measure like the Civil Procedure Code.

Amendments proposed by the Select Committee.—It will be remembered by the readers of the previous article on the present subject that the main feature of the Bill was the distinction between fundamental principles applicable to all Courts to be embodied in the Code itself and alterable only by legislation, and detailed rules of procedure variable by High or Chief Courts with the assistance of Rule Committees. It is most satisfactory to find that this distinction has been almost unanimously approved by local governments and High Courts and that there is a general consensus of opinion in favour of it. The Select Committee found it necessary to propose only a very few amendments in the Bill and Orders attached—a striking testimony to the thoroughness of the work done before circulation for opinion. The amendments (to which several were added without objection by any one at the meeting of Council) are, almost without exception, either draftsman's amendments or otherwise of an unimportant kind; there is only one amendment on which I need comment. As the Code now stands a judge of a Civil Court subordinate to a High Court has been added to the members of the Rule Committee. The Bill provided that of the three judges of the High Court called to the Rule Committee at least one should have served as a District Judge or (in the Punjab or Burma) a Divisional Judge for three years. This provision afforded some security that the deliberations of Rule Committees would have the aid of what is known in India as "district experience"—that is familiarity with the ideas and feelings of the people, and

more particularly of the peasantry—gained in close and daily contact with them alike in judicial business and the management of a great variety of public affairs. A District or Divisional Judge, I may explain, would always have been at one stage of his career an executive officer. The security was not, however, complete. A District or Divisional Judge who has been long in a Chief or High Court is likely to learn much, but he may also forget something. His point of view is apt to change. He may become more of a lawyer, less of an administrator. The addition to the Rule Committee of a District or subordinate Judge actually employed as such at the time will tend to give better effect to one of the main objects of the new Code, which is to meet the varying needs of a vast diversified Empire. It is the officer habitually in touch with the people who will be able to tell the Rule Committee what points of procedure favour the exactions of the underlings of the Courts, what points enable the hungry crowd of petty practitioners to prolong proceedings and make money out of their clients' ignorance, and what points prevent the peasants from doing their own legal business for themselves with the aid only of the petition writers. It may be hoped and indeed expected that the Chief Justices or Chief Judges who make appointments to Rule Committees will select District or subordinate Judges who will be able to help the Committees with this kind of advice.

Speech of the Hon. Mr. Ismay.—Personally I regard the variability of procedure according to locality as the greatest boon bestowed by the new Code upon the peasant population. The Hon. Mr. Ismay, who was one of the speakers in the final debate, possibly takes another view, though I am not sure that he and I really differ in opinion. He made indeed what appears to me to be the paradoxical remark, that the main reason why he had always warmly advocated the division into code and rules was that such an arrangement should, and he hoped would, tend to promote uniformity. It might well be asked, if the object is uniformity, why have such an arrangement at all? But I can recall a small occurrence of some twenty-five years ago which enables me to offer a plausible explanation of the apparent paradox. "At present," said Mr. Ismay, "there is scarcely a section of the Code which has not at some time or other been the subject of conflicting rulings for the reconciling of which no remedy, short of a legislative enactment, is available. One has only to open the pages of any annotated edition of the Code in order to realise the extent of confusion which has been developed by case law during the last quarter of a century, and it is unreasonable to expect the Legislature to intervene whenever the interpretation of a particular phrase gives rise to a conflict of opinion. I have every confidence that under the new Code such a state of confusion will no longer be possible." I remember very well that I was present as a spectator at the debate on the Transfer of Property Act when it was passed in 1882, and that Sir Charles Crosthwaite, who was then Judicial Commissioner of the Central Provinces and Additional Member of the Legislative Council of the Governor-General, pathetically

complained in his speech that he, as the single judge of a Court in the middle of India, was habitually pelted with the conflicting decisions of four High Courts and one Chief Court; and he advocated the Bill, which became the Transfer of Property Act, on the ground, amongst others, of uniformity. The Hon. Mr. Ismay has lately held the high judicial office held at that time by Mr. Charles Crosthwaite. Possibly his experience may have been the same; if so, and if what he means is that the new Code will go far to prevent the bombardment of each High Court by conflicting decisions of the rest, I entirely agree with him. Uniformity of enacted rules in different parts of India is one thing: consistency of interpretation within the province, and if there is inconsistency its speedy remedy within the province, make another. The new Code should certainly conduce with rapidity and effect to intra-provincial consistency, and the very fact that each High or Chief Court may make its own rules, which presumably will be suitable to its own province, will be a sufficient reply to an argument that what is law for Madras or Bombay or the United Provinces or Bengal should be taken as law also in the Central Provinces.

Complexity of the Indian Problem.—Writing of India in 1871, Maine observed:[1] "It is by its indirect and for the most part unintended influence that the British power metamorphoses and dissolves the ideas and social forms underneath it; nor is there any expedient by which it can escape the duty of rebuilding upon its own principles that which it unwillingly destroys." The remark is not in every particular applicable in the present connection, because both legislation and civil procedure, as understood in the West, were in India British importations. There was no question of unintentionally destroying indigenous institutions of these descriptions, for there was nothing to destroy. Here then, it may be said, is an empty site; let us build upon it according to our own design as we please. There could hardly be a greater mistake than this: it was committed in Lower Bengal at the time of the Permanent Settlement, and any attentive observer of Indian affairs is, if he has Indian experience, probably aware that the danger of its repetition is no unreal one. That "our own principles"—the legal and political ideas of the West—must largely influence us is unquestionable. It will have been noticed in the extract I made from the speech of the Hon. Mr. Richards that he gave as one of the reasons for legislation that the Act of 1877 was based on English practice, which had been altered since that year. We shall not overlook our own principles: there is no fear of that. But the problem is much too complicated to be successfully solved by any application of our own principles exclusively. Maine denounced as chimerical the idea of reconstructing Indian society on a purely Indian model: in this he was fully justified. British rule has changed the environment. We cannot recall the past: and those who know best what the past of India was like would be the last to wish it back again. The task would be a comparatively simple one if

[1] *Village Communities in the East and West*, p. 28.

we could govern India in accordance with the systems which prevailed before our day; and there was in the Delhi Empire a certain system, though ill-formed and most capriciously administered, and a better system in many Rajput principalities of which, fortunately, a large number still survive. The task would also be comparatively easy if we could govern simply in accordance with the ideas and principles of the West. But the extreme difficulty of the actual task consists in this—that we have to devise measures, both administrative and legislative, suitable to India in its changed environment and as it has been itself altered by the unceasing pressure which that environment exerts. To perform this task adequately demands not only wide experience of the country, but efforts of constructive imagination which tax to an unusual degree the capacity of statesmanship. It would be an error to suppose that the political and social condition of India was stationary before our day. We appeared upon the scene when there had been a double religious revival —Sikh and Hindu—against Muhammadanism, when the movement towards a feudal state of society had been accelerated by the downfall of the Delhi Empire, when two vast communities—the Sikhs and the Mahrattas—were showing signs of nascent national life. What we now have to do is to diagnose the normal political and social tendencies of Indian races and to add to that diagnosis an estimate, most difficult to frame, of the fluctuations, expansions, and contractions of those tendencies under the changed conditions of a new Empire. It is as though a diversion of the seething flood of some great river had been effected by physical causes, more or less foreseen, but had happened before we had completely prepared a system of canals and large and small distributaries to metamorphose threatened havoc into fertility and abundance. Damage, however, is continuously being repaired as we get to know the commanded area better; and the original rough alignments are constantly being improved.

Anticipations of the Working of the New Code.—As for the new Code of Civil Procedure we may consider two great classes—the educated Indians and the peasantry. I will say nothing here of the defects of the Western system of education in India, which stands at least as much in need of reform as the system of education in the British Isles. I will only say that whatever may be the defects of the Western system in India, it will have sufficed to enable those who enter on the legal profession to understand and administer the new Code. Educated Indians will, I think, appreciate it. In their case the change in the past hundred—nay, in the past fifty—years is enormous. They live in a new atmosphere; they are sustained by a novel sort of mental food; and it is a deliberate understatement of the case to say that their powers of wholesome assimilation vary greatly. It is the fashion to assert that this alteration of mental condition is confined to the merest fraction of the population; and that the peasantry remain unchanged. It is quite true that those who have partaken of Western learning are few in comparison with the millions of ignorant tillers of the soil. But speaking of my own part of

India I may say that it is not quite true that the peasantry are unchanged. A new generation has arisen which remembers less vividly than that which has passed away the deliverance from serious tyranny and habitual plunderings and war. The law courts are an educational instrument of greater strength and wider operation than the schools and universities. There is a growing sense of individual right and of equality before the law. All the more necessary is it that the peasantry should have confidence that their wants will be met, their feelings sympathetically considered, and their grievances redressed. For these purposes it is the officers possessing district experience who are their guardians and representatives. The working of the new Code, so far as it will tend to the advantage of the peasantry, will depend mainly upon the exertions of officers with district experience who will be members of the Rule Committees, and upon the vigilance of district officers generally who will be able to bring material points to the notice of the Committees. Heretofore district officers have perhaps felt that to urge omissions or simplifications which would tend to restore the practice of early days after annexation, would merely waste their time, because nothing could be done without legislation for the whole of India. That practice, so far as the peasants were concerned, was such as to enable them largely to conduct their own legislation. The case differs materially now that amendments can be made by provincial Committees of provincial experience in Court rules of provincial application. District officers thus have their opportunity. There will be opposition, and to what extent they will use their opportunity remains to be seen. But it is not too much to say that unless district experience is brought to bear on the deliberations of the Rule Committees, the chief advantage of the Bill for the peasantry will be lost.

THE NEW GERMAN STATUTE AS TO CHEQUES.

[*Contributed by* ERNEST J. SCHUSTER, ESQ., LL.D.]

General Observations.—The custom of keeping accounts with bankers and using cheques as means of payment exists to a much larger extent in the United Kingdom and the United States of America than on the European Continent. This explains the somewhat backward state of the Continental law on this subject. The French statute of 1865 relating to cheques, as amended in 1874, the Belgian statute of 1873, and the provisions of the Italian Commercial Code on the same subject (Arts. 339-45) are all very incomplete. The rules contained in the Swiss Code of Obligations (Arts. 830-37) and in the Danish statute of 1897 are somewhat fuller, but they have not stood the test of an extensive practical experience. In Germany the wish to popularise the use of cheques has, for a considerable period, induced bankers and others to foster legislation on the subject, more particularly as the law applicable to documents taking the form of cheques was uncertain and to a considerable extent dependent on State Law (see Art. 17 of the statute of 1897 introducing the New German Commercial Code).

Notwithstanding this fact, the attempts made in 1882 and 1892 to induce the Imperial Legislature to pass a law on cheques, on the basis of a draft prepared by Dr. Koch, the eminent President of the German Imperial Bank, proved abortive, and it was only after Austria had (in 1906) enacted a statute on the subject that the matter was taken up seriously and brought to a successful issue. The fact that Austria was first in the field had the effect of hampering the German legislator to a certain extent, inasmuch as it would have been very undesirable that there should be any substantial differences between the laws of the two countries. This circumstance had some advantage, as it caused, or at any rate facilitated, the elimination of some very objectionable provisions contained in the Government draft, but on the other hand it helped to perpetuate some essential differences between Continental law on the one side, and British and American law on the other side. The last mentioned systems of law prevail in countries in which cheques have for a considerable period been a familiar and popular institution, and they have on the whole proved eminently satisfactory. It

remains to be seen whether the many deviations from these systems of law which are to be found in Austrian and German statutes will not somewhat hinder the attainment of the main object for which they were included; but commercial intercourse generally accepts the law as it stands and tries to accommodate itself to its deficiencies. The following observations refer to some of the principal distinctive features of the German statute.

Essential Requirements of Cheques.—Under British law every bill payable on demand drawn on a banker is deemed a cheque; under the German statute (s. 1) an order to pay on demand, whether drawn on a banker or not, is not deemed a cheque unless it complies with each of the following requirements: (*a*) it must be described as a cheque in its text; (*b*) it must contain an indication as to the place of issue; (*c*) it must request the drawee to pay its amount "out of funds standing to the drawer's credit." The absence of these indications on British and American cheques has never caused any doubt, difficulty, or inconvenience, and the reasons for making them essential requirements were of a purely theoretical nature. From the point of view of those who desire to facilitate the use of cheques it would, in the writer's opinion, have been desirable to follow the British and American example.

Requirement as to Drawee being a Banker.—The German statute directs that the drawee of a cheque payable in Germany shall be a bank or one out of certain specified classes of similar institutions (s. 2); but this is not an essential requirement; the disregard of the rule does not invalidate the document, but only has the effect of excluding the exemption from the *ad valorem* stamp duty chargeable in respect of bills of exchange payable on demand, which, as a general rule, is accorded to cheques (see s. 29). A document, describing itself as a cheque and complying with the requirements referred to above, is deemed a cheque though the drawee be neither a bank nor a similar institution. Even as regards stamp duty, the rule as to the qualification of the drawee of a cheque does not apply to cheques payable outside of Germany if the country on which the cheque is drawn does not impose any condition as to the drawee's qualification (s. 25). A document purporting to be a cheque payable in England, drawn on any drawee not being a banker, must therefore have the *ad valorem* stamp required in the case of bills of exchange, as English law requires the drawee of a cheque to be a banker; but a cheque payable in France, though not drawn on a banker, is not liable to German *ad valorem* stamp duty, inasmuch as according to French law cheques may be drawn on persons not being bankers (see Art. 1 of French Statute of 1865).

Holder's Duty as to Presentment.—Under British law a cheque must be presented "within a reasonable time of its issue," and in determining what is a reasonable time regard is had "to the nature of the instrument, the usage of trade and bankers, and the facts of the particular case" (Bills

of Exchange Act, 1882, s. 74). Under the German statute, on the other hand, hard-and-fast rules are laid down for all cases. A cheque drawn and payable in Germany must be presented within ten days after the date of issue, an additional day being allowed in any case in which the last day of the period allowed for presentment falls on a Sunday or public holiday. In the case of cheques payable outside of Germany, the period varies between three weeks and three months (see s. 11 of the Statute and Order of Federal Council dated March 19, 1908). The British rule, being more elastic, seems to be more convenient. It seems hardly necessary that in the case of the negotiation of a cheque payable in the place of negotiation the person acquiring the cheque should be allowed to delay presentment for ten days, while in the case of cheques transmitted from place to place the period of ten days may sometimes appear very short.

Consequences of Omission to present Cheque within the Prescribed Period.—Under British law a person who omits to present a cheque within the prescribed period forfeits his right of recourse against the indorsers, but the drawer, or the person on whose account the cheque was drawn, is in such a case discharged only in so far as he had suffered any damage through the delay; moreover, the holder of the cheque, in so far as the drawer, or the person on whose account the cheque was drawn, is discharged from his liability, acquires all rights of the latter against the drawee. The following illustration will show the effect of this rule:

On July 1, 1908, A pays a debt owing to B by a cheque on a London banker; B presents the cheque for payment on July 16, 1908, and payment is refused on the ground that on the day preceding the presentment the drawee had suspended payment. From the date of the issue of the cheque down to the date at which the drawee suspended payment A's credit balance amounted to £200. B has lost his right of recourse against A, but to the extent of £100 he can prove against the banker's estate in lieu of A.

Under the German Statute (ss. 16, 21) the mere fact that the presentment was effected too late discharges the drawer as well as the indorsers; the holder's remedy in such a case consists exclusively in the right to claim from any person whose liability is discharged any "unjustified benefit" (Bereicherung) which by reason of such discharge has accrued to such person to the detriment of the holder of the cheque. It will be seen from this that a German holder's position is much less favourable than that of a British holder; the latter does not forfeit his right unless the drawer can prove that he has suffered damage by reason of the delay; under German law the burden of proof is transferred to the holder: unless he can prove that the loss of his right of recourse confers an undue advantage on the drawer, he has no claim against the latter. Even where the facts are undisputed the German holder is in a worse position. Assuming the facts to be as in the illustration given above, the holder has no claim

against the drawer unless the latter has actually received a dividend out of the drawee's estate. He can neither compel the drawer to assert his right against the drawee's estate nor claim a transfer of that right to himself. The popularity of cheques will not be increased by the undue favour thus shown to the drawer at the cost of the holder.

Rules as to Crossing of Cheques.—The effect which British law attaches to a "general crossing," a "special crossing," and a crossing with the words "not negotiable" (see B.E.A. ss. 76-81) is so well known that it is unnecessary to refer to it specifically. Under the German statute the only recognised mode of crossing consists in the affixing of the words "nur zur Verrechnung" (exclusively for set-off in account) on the face of the cheque. A cheque bearing that indication may not be paid in cash and can be discharged exclusively by set-off (s. 14). The set-off may be effected by means of entries in the books of the Imperial Bank, and as every banker in Germany keeps an account with that bank, the result is that the German crossing has approximately the same effect as a "general crossing" under English law. It is, however, strange that the two other modes of crossing referred to above, which add materially to the safety of cheques as means of payment, should not have been thought worthy of adoption. It is also an inconvenience that the use of a set form of words is necessary in all cases under German law, whereas under British law two parallel transverse lines with or without the words "and Company" or any abbreviation thereof are sufficient. Small traders who receive cheques in payment of their accounts and have to forward them by post will be considerably inconvenienced by the strictness of the German rule.

Acceptance or Certification.—Under British law cheques are often accepted by bankers not being members of the Clearing House, with the object of rendering such cheques payable at the acceptor's Clearing Bank; the question whether such an acceptance, in the case of a cheque payable to bearer, contravenes the provisions of the Bank Charter Act has never been raised nor has the legal effect of the acceptance of a cheque been ever discussed by a British Court of law. In the United States it is customary for bankers to "certify" cheques payable with them, and the Negotiable Instruments Act (s. 194), by declaring that certification is equivalent to acceptance, seems to imply that the acceptance of a cheque has the same effect as the acceptance of an ordinary bill of exchange. The German statute, on the other hand, declares (s. 10) that an acceptance affixed to a cheque is without any effect. There is much to be said in favour of the German solution of the difficulty.

Effect of Forged Indorsements.—Under British law no title to a cheque can be derived through a forged indorsement (B.E.A. 1882, s. 24). The rule that a banker who "in good faith and the ordinary course of business" pays a cheque bearing a forged indorsement (*ibid.* s. 60) protects the banker paying such a cheque, but the person to whom or for whose benefit

the amount of such a cheque is paid—in so far as he cannot avail himself of the provisions of s. 82 of the B.E.A. 1882 and of the Bills of Exchange (Crossed Cheques) Act, 1906—is bound to refund to the true owner the amount received by him or credited to him. Moreover, if the true owner has caused the drawer to stop payment of such a cheque before it was presented for payment, the holder, if he cannot obtain payment from his predecessors in title, is without a remedy. Under German law a person who in good faith and without gross carelessness acquires a cheque on which there is an outwardly complete chain of indorsements acquires a good title notwithstanding the fact that one of the indorsements is forged (see s. 8 of the German statute, incorporating ss. 36, 74 of German Bill of Exchange Code). The German system seems on the whole more equitable. When a cheque is stolen, some innocent person must, as a general rule, bear the loss: the German law imposes the loss on the person from whom the cheque is stolen; the British law, on the other hand, imposes the loss on any person who, having acquired the cheque subsequent to the forgery, is unable to obtain repayment from his predecessor in title. As precautions may be taken against theft, but as no precautions can possibly enable a person who acquires a cheque to discern whether all the indorsements thereon are genuine, it seems more just that the person from whom the cheque is stolen should be the sufferer.

Prospects as to Popularisation of Cheques.—The introduction of a uniform law as to cheques in the German Empire will no doubt in some degree encourage the use of cheques, but it cannot be expected that the progress in this direction will be very rapid. Cheques cannot be used except by persons keeping banking accounts, nor are they readily accepted in discharge of debts by persons not accustomed to receive them. The habits of the residents of a country, as to the keeping of banking accounts and as to giving receipts in exchange for substitutes for money, are not changed at the bidding of the legislature, but as time goes on useful institutions are gradually recognised as such, and their recognition is assisted by the existence of clear and equitably legal rules relating to such institutions.

NUDUM PACTUM IN ROMAN-DUTCH LAW.

In view of the recent controversy and difference of opinion between lawyers of eminence as to the doctrine of Roman-Dutch law with regard to *nudum pactum* and "lawful cause," we print in full the following interesting judgments of the Supreme Court of Ceylon dealing with this question which we have received from the Colonial Secretary at Colombo:

Lipton v. *Buchanan et al.*, District Court Colombo, No. 14621.

The two defendants were at one time trading in partnership under the name and style of Buchanan, Frazer & Co., and they then became indebted to the plaintiff in Rs. 15,259.96. The partnership was dissolved by mutual consent and a receiver was appointed to recover the assets. Thereafter the second defendant, through the receiver, paid the plaintiff's attorney one-half of the above debt and received from him in writing the following undertaking:

"In consideration of my having received from Mr. S. D. Young, the receiver of the late firm of Buchanan, Frazer & Co., the sum of Rs. 7,629.98 contributed by you as your half share of the debt owed by that firm to me, I hereby undertake that I will not take any steps against you personally for the recovery of the balance of the amount due by the aforesaid firm until I have exhausted every possible means of recovery against your late partner, Mr. D. R. Buchanan."

At the date of this undertaking the first defendant was possessed of ample means to pay his debts. The plaintiff, however, delayed to take any steps against the first defendant for more than a year, and in the meantime the first defendant contracted fresh debts, and his property was exhausted in the payment of his debts except that due to the plaintiff.

The plaintiff in the present action sued both the defendants, and claimed that they be jointly and severally condemned to pay him the balance sum of Rs. 7,629.98.

The second defendant pleaded that the plaintiff's delay was a breach of the above agreement and that he was not therefore liable.

The District Judge who tried the case, held (1) that the agreement was governed by the English law and inoperative for want of consideration; (2) that even if the Roman-Dutch law applied, it was equally inoperative for want of consideration; and (3) that the delay on the part of the plaintiff did not constitute a breach of the agreement; and entered judgment for the plaintiff as prayed.

The second defendant appealed to the Supreme Court, and the case was argued before Justices Wendt and Middleton, who delivered the following judgments:

WENDT J.: The facts out of which this appeal arises are as follows: The defendants, Buchanan and Frazer, carried on business in partnership under the style of Buchanan, Frazer & Co. until the year 1896, when the partnership was dissolved by a decree of the District Court, which appointed a receiver of the partnership business. The partnership had incurred a debt of Rs. 15,259.96 to

the plaintiff, and on May 5, 1899, the defendant Frazer, recognising his liability in the winding-up to contribute one-half of this sum, paid to the receiver Rs. 7,629.98, which the receiver paid over to plaintiff on account of the firm's indebtedness. On the same day the plaintiff wrote to Frazer the letter B 1, which is in the following terms:

"GORDON FRAZER, ESQ.

"DEAR SIR,—In consideration of my having received from Mr. S. D. Young, the receiver of the late firm of Buchanan, Frazer & Co., the sum of Rs. 7,629.98 contributed by you as your half share of the debt owed by that firm to me, I hereby undertake that I will not take any steps against you personally for the recovery of the balance of the amount due by the aforesaid firm until I have exhausted every possible means of recovery against your late partner, Mr. D. R. Buchanan.

"Yours faithfully,
"THOS. J. LIPTON,
"By his attorney, S. JEFFERY."

No further payment having been made, the plaintiff, on February 23, 1901, commenced this action against both Buchanan and Frazer to recover the remaining moiety of their firm's debt, viz. Rs. 7,629.98. The first defendant pleaded a set-off, admitting a net balance to be due of Rs. 2,303.15, and also pleaded the Ordinance of Limitations. He has not, however, appealed against the decree which was passed for plaintiff's claim in full. (I may note in passing that the decree should have been for Rs. 6,538.70 only, the plaintiff having in his replication limited his claim to that sum.) The second defendant in defence set up the undertaking contained in plaintiff's letter B 1, averring that plaintiff had failed to take any steps whatever against the first defendant for the recovery of the debt, and in the alternative claimed damages for breach of the said agreement. The learned additional District Judge held that the effect of the agreement must be determined by English law, and not by Roman-Dutch law; that it was bad for want of consideration, the payment by Frazer of a debt which he owed being no consideration, and that, moreover, such consideration as was constituted by the payment had been past at the date of the agreement. He further held that plaintiff had committed no breach of it: he had tried various means amicably to recover the debt, and, these failing, had been obliged to come to Court. He might, in fact, say he was still carrying out the terms of the agreement. He was obliged to sue Frazer also, or he would have lost all remedy against him, and he might, on recovering judgment, still enforce it against Buchanan in the first instance, and resort to Frazer in the event only of nothing being so recovered. Judgment was therefore given for the plaintiff, and the defendant Frazer has appealed.

As regards the law applicable to the case, I think the District Judge was wrong. He gives no reasons for his opinion, but I gather that he relied, as respondent's counsel before us did, on the Ordinance No. 22 of 1866, which enacted that "in all questions or issues which may hereafter arise, or which may have to be decided in this Colony with respect to the law of partnership . . . the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any ordinance now in force in this Colony or hereafter to be enacted." The question here raised is not one "with respect to the law of partnerships."

It does not arise among partners or between partners and a third party. It is between two individuals. It is admitted that Frazer owed plaintiff a debt, and the question regards the validity of an agreement not to recover that debt. The fact that that debt arose out of plaintiff's dealing with Frazer and his partner does not affect the point. I think the English law is excluded, and that the Roman-Dutch law, as the common law of the country, is the law which should be applied.

According to that law, then, even assuming the agreement was *nudum pactum*, it would yet support an action. The maxim of the Roman law—*Ex nudo pacto non oritur actio*—did not obtain in the Roman-Dutch law.

Voet (2, 14, 9) says that *nude pacts* made in earnest and with a deliberate mind give rise, equally with contracts, to an action. Grotius (3, 1, 52) says it was the rule and practice that all promises based upon any reasonable cause gave a right both of action and of exception (Maasdorp's Translation, 1st ed. p. 304),

Van der Keesel, dealing with this passage, says : "A promise which is not founded on a just *causa debendi* does not give a right of action, although in other respects the action is maintainable as a *nudum pactum*."

Groenewegen, De Leg. Abr. (ad Cod. 2. 3), lays it down : "Moribus nostris ex nudo pacto non solum exceptionem sed et actionem competere constat."

Van der Linden (1, 14, 1) prescribes the following conditions as necessary for the existence and validity of perfect obligations: (1) a lawful source (*causa*); (2) competent parties ; (3) a thing capable of being the subject of an obligation. He then (section 2) states the most general source of obligations to be contracts, and dealing with the grounds of their invalidity says : "Contracts are also void when made without any *causa* whatsoever, or on a false *causa*, or on a *causa* which is contrary to justice, *bona fides* or *boni mores*."

Causa denotes the ground, reason, or object of a promise, giving such promise a binding effect in law. It has a much wider meaning than the English term "consideration," and comprises the motive or reason for a promise, and also purely moral consideration. (See a learned note by the translator at p. 28 of Kotze's Van Leeuwen, vol. ii., where the subject is discussed at length.)

In the present instance there was a lawful *causa* for the agreement. The creditor recognised that although the entire debt might be exigible from either partner, yet between themselves each was liable for one half only. A receiver was in possession of the firm's assets, which had not enabled him, in spite of the winding up being three years old, to pay the plaintiff anything at all. The defendant Frazer thereupon came forward and paid half the debt, presumably saving the plaintiff further delay and trouble, and the plaintiff in return promised not to proceed against Frazer for the balance until Buchanan had been completely excused. It may be that according to English law there was no consideration for this promise, but I certainly think that according to our common law it was supported by a sufficient *causa*. Suppose that, instead of merely making further action against Frazer dependent on a certain condition, the plaintiff had, upon receiving the payment, absolutely released him from the balance of the debt ; he could not thereafter have been sued for it. That was laid down by this Court in *Wikramasekara* v. *Tatham* (Grenier, 1873, D.C. p. 31) and has always been accepted as good law. Why then should not the lesser promise be equally binding on the plaintiff ?

The next question is, whether plaintiff has fulfilled the condition precedent to further recourse against the defendant Frazer. Has be exhausted every possible means of recovery against Buchanan ? And here it is said that this very action, being a proceeding by which Buchanan may be compelled to pay, is a step towards

exhausting every possible means of recovery against him, and cannot therefore be objected to by Frazer. But this contention I consider unsound. If it were otherwise, plaintiff might wait twenty years without setting the law in motion against Buchanan, perhaps occasionally accepting payment of a few rupees from him, just sufficient to avoid prescription, and then come against the appellant, who would be without defence. That surely was not the meaning of the agreement contained in letter B 1. Its terms could not have been stronger: plaintiff is to *exhaust all possible means of recovery* against Buchanan. Surely that meant that plaintiff was to act promptly, within a reasonable time; that he was not to delay until the condition intended for Frazer's protection became meaningless and nugatory by Buchanan wasting his substance and becoming insolvent. That is just what happened. At the date of the agreement he was quite solvent. He owned the property called the Maddema Mills, which nearly two years later and a month after the commencement of this action was sold for Rs. 82,500, and after satisfying the mortgagees left a balance of Rs. 12,890.49. It may be true that plaintiff could not without obtaining a judgment attach this property. Why then did he not proceed to obtain a judgment? The appellant repeatedly pressed him to take the necessary steps to realise his debt out of the mills, and doubtless Frazer would then have raised no objection to being sued along with Buchanan, if that was a formality necessary in law to preserve plaintiff's ultimate right of recourse against him in terms of the agreement. But no action was brought. The excuse offered is that Buchanan in March 1900 wrote to plaintiff's proctors the letter P 1 authorising them out of the proceeds of the sale of Maddema Mills, after satisfying the mortgagees, to pay plaintiff his half share of Buchanan, Frazer & Co.'s debt, "less the amounts due to me on the Hunt general and advertisement accounts rendered." Besides the fact that this letter is dated ten months after the agreement in question, it affords no valid excuse for plaintiff's delay. For the Hunt general and advertisement accounts, which were and are disputed by plaintiff, and which Buchanan has in this action not attempted to substantiate, amounted to Rs. 5,326.83, and the authority to pay could therefore only apply to the balance of plaintiff's claim, viz. Rs. 2,303.05, and could not excuse the delay in enforcing the claim. In fact, plaintiff's proctors tried to induce Buchanan to withdraw the qualification relating to his counterclaim, but failed. The authority, such as it was, was thereafter verbally withdrawn by Buchanan at some unascertained date before the sale, and the net balance of the proceeds of the sale was applied in paying his unsecured creditors. Buchanan has left the island an insolvent, and Frazer, if condemned in this action, has no prospect of recovering contribution from him.

For these reasons I think that plaintiff has not fulfilled the condition entitling him to recover his claim from the appellant, and that it is no longer in his power to fulfil it. The action therefore fails, and I would allow the appeal with costs.

MIDDLETON J.—I have had the advantage of reading my brother Wendt's judgment, and as he has fully set out the facts it is needless for me to recapitulate them. As I queried during the argument, and think now, this is not a question with respect to the law of partnership, which would oblige us under Ordinance No. 22 of 1866 to apply the English law.

The question here is, whether the second defendant is protected from the action of the plaintiff by the terms of a letter written by the plaintiff's agent at second defendant's request?

On one construction of that letter the second defendant could be sued on his admitted liability as a former partner of the first defendant, on another he could not.

The construction does not depend on any question of partnership, but on a

consideration of certain facts showing whether or not the plaintiff "has exhausted every possible means of recovery" against the second (*sic*) defendant.

The plaintiff and defendant are not, nor ever have been, partners, and the fact that second defendant was at one time a partner with the first defendant raises no question that I can see with respect to the law of partnership which would affect the plaintiff's right to sue the second defendant as governed by the letter in question.

I agree, therefore, with my brother, that the learned additional District Judge was wrong in applying the English law to the case, and concur in my brother's view of the Roman-Dutch law as applicable to this case, and his conclusion that the plaintiff has not fulfilled the conditions entitling him to recover his claim from the second defendant.

The appeal must therefore be allowed with costs.

Preparatory to an appeal to His Majesty in Council, the case was heard in review by the Supreme Court, consisting of Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Wendt, and Mr. Justice Middleton, and the following judgments were delivered by their lordships :

HUTCHINSON C. J. : This is a hearing in review before appeal to His Majesty in Council. The appellant is the plaintiff, who sued Buchanan and the respondent Frazer, to recover a debt due to him from the late partnership firm of the two defendants. The firm was admittedly indebted to the plaintiff at the time of its dissolution in 1896 in the sum of Rs. 15,259.76. One half of the debt was paid by Frazer, and the action was brought to recover the other half. The defence set up by Frazer was that at the time when he paid the one half of the debt on May 5, 1899, the plaintiff, in consideration of his making the payment out of his own private funds, made the following agreement with him :

"4, PRINCE STREET, COLOMBO,
"*May* 5, 1899.

"GORDON FRAZER, ESQ.

"DEAR SIR,—In consideration of my having received from Mr. S. D. Young, the receiver of the late firm of Buchanan, Frazer & Co., the sum of Rs. 7,629.98, contributed by you as your half share of the debt owed by that firm to me, I hereby undertake that I will not take any steps against yon personally for the recovery of the balance of the amount due by the aforesaid firm until I have exhausted every possible means of recovery against your late partner, Mr. D. R. Buchanan.

"Yours faithfully,
"THOS. J. LIPTON.
"By his attorney, S. JEFFERY."

And Frazer pleaded that the plaintiff, in breach of that agreement, took no steps for the recovery of the moiety due by Buchanan ; and that Buchanan was thereby enabled to dispose of valuable property belonging to him which would otherwise have been available for the debt.

The issues for decision by the District Judge were :

(4) Did the plaintiff in fact make the alleged agreement, and, if so, was it valid in law ?

(5) If so, did the plaintiff commit a breach of it ?

(6) What damages has Frazer sustained by the breach ?

The District Judge found that the agreement was made, but he held that in

the matter of such agreements (meaning, I think, partnership agreements) we are not governed by the Roman-Dutch law, but by the English law; and that by the rules of English law this agreement was not binding for want of consideration; and he gave judgment against the defendants jointly and severally for the amount claimed. On appeal by Frazer to the Supreme Court Wendt J. and Middleton J. set aside the judgment of the District Court as against Frazer. They held that the law applicable to the agreement was the Roman-Dutch law; that according to that law the agreement was not void for want of consideration; and that the plaintiff did not carry out his part of the agreement, and therefore could not recover against Frazer.

I think that the law applicable to the agreement is the Roman-Dutch law of this Colony; there is here no "question or issue . . . . to be decided with respect to the law of partnerships." And I agree with the judgment now under review that there was a lawful *causa* for the agreement. So that the only question that remains is whether the plaintiff "exhausted every possible means of recovery against Buchanan." I think it is proved that he did not. I need not recapitulate the reasons given by Wendt J. in his judgment now under review for coming to this conclusion. I agree with him, and think that this appeal should be dismissed with costs.

WENDT J.: I agree with the rest of the Court in thinking that the judgment under review should be affirmed. No point was taken at the argument in review which had not been put forward at the argument of the original appeal and dealt with in my judgment. I would only add that the cases cited from the South African Courts were concerned with contracts and agreements which, if the Roman law in its strictness still prevailed, might have been invalid as the foundation of an action, because they were *nuda pacta*, whereas the defence here takes the form of an *exceptio non petendi*, which I am inclined to think would have been sustainable even under that law, and *a fortiori* under the Roman-Dutch law.

MIDDLETON J.: The judgments now in review were given by this Court in September or October 1904, and only now in March 1907 they are brought up in review previous to appeal to the Privy Council. I note that security was only deposited on December 8, 1906.

On the arguments addressed to us by the learned counsel for the appellant in review, I see no reason to alter the opinion on the facts and on the law I formed on the hearing of the original appeal, the grounds for which are set out in my brother Wendt's judgment.

It is not contended that this Court has ever laid it down authoritatively that a promise is not binding unless founded on what is known as consideration under English law, although it would seem to be the case in South Africa.

The learned note of the translator of Kotze's *Van Leeuwen*, vol. ii. p. 28, is in my judgment very cogent, that the right view to be taken of the meaning of the word *causa* is that it is not synonymous with the somewhat technical word "consideration" in the English law, but has a wider significance, as pointed out by my brother in his judgment.

I would therefore dismiss this appeal in review, with costs.

THE MARKET IN AFRICAN LAW AND CUSTOM.

[*Contributed by* NORTHCOTE W. THOMAS, ESQ., M.A., F.R.A.I.]

GENERAL INTRODUCTION.

Primitive Trade.—It would be very far from true to say that the study of primitive economics has been totally neglected; but such work as has been accomplished has been done almost entirely by German and French investigators;[1] and yet, as things go, economics is not unpopular in England. Though our data are only too often fragmentary, the history of primitive trade is a wide and fascinating subject; for though the wholesale production of commodities characteristic of European nations at the present day is a mushroom growth, it is probable that trade in one form or another is an almost universal feature of human life. Archæology supplies us with evidence of transmission of goods in prehistoric Europe; we learn from Herodotus that more than two thousand years ago the Carthaginians voyaged beyond the Pillars of Hercules and held intercourse with the natives by the primitive method of the silent trade, a form of market which, as the reports of Livingstone and other observers of our own age show, has survived until the present day; even in Australia, where personal property is reduced to a minimum, we find tribes with stores of red ochre on their territory exchanging supplies of that cosmetic for bean-tree wood, from which their shields are made; and spears, shells, stimulants such as *pituri*, and other commodities often travel hundreds of miles. Buckley, the English castaway, records a case in which Victorian tribes exchanged fish and vegetable food; but met for this purpose at intervals of some months only. It would be easy to multiply examples of commerce among primitive peoples.

Although primitive trade in general has received a fair amount of attention, the primitive market has somehow been almost entirely overlooked;[2]

[1] Among important works may be mentioned: Andree, *Geographie des Welthandels*, Stuttgard, 1877; Schrader, *Handelsgeschichte und Warenkunde*, Jena, 1886; Petri, *Verkehr und Handel in ihren Uranfängen*, St. Gallen, 1889; Letourneau, *L'Évolution du Commerce*, Paris, 1896; information is also found in Roscher, *System der Volkswirtschaft*, vol. iii.; *Zeitschrift für Völkerpsychologie*, **10**, 378 *sq.*; *Zeitschrift für Social und Wirtschaftsgeschichte*, **4**, 1 *sq.*

[2] The principal works are: Huvelin, *Essai historique sur le Droit des Marchés et des Foires*, Paris, 1898; Grierson, *The Silent Trade*, Edinburgh, 1903; and Lasch in *Zeitschrift für Socialwiss.* **9**, 619, etc., which came to my notice after the present paper was written (I have, however, been able to make use of this excellent piece of work). For the legal side of the market see *Zeitschrift für vgl. Rechtswiss.* **11**, 196-220.

in the present paper I propose to fill up the gap to some extent, so far as Africa is concerned.

Form of Trade.—Trade consists in the exchange of goods: it may be conducted by bringing the goods to the purchaser, or by designating a place where the purchaser can find the goods which he needs. With the first of these forms, which is represented in Africa by the caravan trade, we are not here concerned, though, as will be seen below, the caravan trade passes imperceptibly into the second form, which is represented by the market, the bazaar, and the shop. There are of course transitional forms, of which the most important is the fair, which is essentially a market that recurs annually, or, at most, a few times a year; in Africa it originates in the caravan trade, though in Europe and possibly elsewhere it is more intimately connected with religious festivals. With the extension of the period during which a fair lasts, it tends to become a bazaar; thus the fair at Berbera lasted some six or seven months and for the remaining period the place was deserted, the sellers departing with their ships or caravans and the purchasing tribes of the surrounding area returning to their original nomadic state.[1]

In one aspect the fair is a market with long intervals of time between its successive recurrences; but this is only true from the superficial point of view. The market is originally a place where food-stuffs are sold, whereas in the fair the main feature is the sale of non-perishable goods, though of course the sale of food is naturally also an element. Moreover, in the market as it was originally constituted, the goods are not permanently deposited on the market-place, though the sellers' booths may be and often are a permanent feature; and there is always an interval between successive markets on the same spot, most often four, five, or seven days, but ranging between extremes of two to fourteen days.[2] This differentiates the market from the bazaar and the shop, which are further found only near or in towns.

Location of Market-Place.—The primitive market was not necessarily in or near a town or village, in fact there is much to be said for the view that it was originally always remote from human habitations. In process of time, however, a permanent trading population may come to inhabit the neighbourhood of the market-place, a village springs up, and with the growth of population the intervals between successive markets become shorter and shorter, till the market has been transformed into the bazaar, open daily within specified hours and lodged perhaps in more or less permanent buildings. Side by side with the transformation just mentioned goes another, the appearance of larger and larger quantities of non-perishable goods on the scene, till the outward aspect is indistinguishable from that of the long-period fair.

Economic Evolution.—I need hardly point out at length the far-reaching effects of these concurrent changes. Production was originally directed towards supplying the needs of the individual household, and only surplus

[1] *Petermann's Mitteilungen* ("P.M."), Erg. Bd. **10**, 36.

[2] See Lasch, *Zeitschrift für Socialwiss.* **9**, 764–7 and below.

products appeared on the market; as trade became more prominent, there appear such new elements as the use of hired labour or of slaves in the house and ultimately in the workshop and factory, for the production of goods which bear no relation to household needs; the specialisation of industry with its concomitant increase of technical skill; the appearance of the journeyman craftsman; the hereditary trade and many other features in the productive side of the matter. The producer again was at the outset in direct relations with the consumer; but circumstances soon called into being the middleman, who buys to sell again, the merchant, and the broker, who is simply an agent in the commercial part of the business, but is also the legal representative of the seller, and at once responsible for his safety and his misdeeds. Such at any rate has been the course of development in Africa.[1]

Geographical Distribution of Markets.—For the development of trade of any sort differences of culture, environment, or technical skill are necessary; and the second condition is naturally the deciding element in the evolution of the market, which is, as we have seen, originally a place for the sale of food. Broadly speaking, continental areas are more favourable to the development of markets, island areas to that of long-distance trade; the sea is the natural highway of commerce, and the ship of the desert is only an echo of the sea-going vessel, though the caravan trade in some areas attains high importance. As regards island areas the statement just made is well illustrated by the fact that both in Oceania and the Asiatic islands markets were almost unknown; in Borneo and other large land areas they are known, but either of late date or due to earlier outside influence. At the same time there are many continental areas where no markets were known; thus in the New World they were confined to Central America and Peru; they were not known in Australia; in North Europe they only appear after the Völker-wanderung; and in Northern and Central Asia they seem to be derived from the Persians.

On the other hand, the market was an important element in the life of Mexico and Peru; in Arabia, India, and China it goes back to a remote period; from Greece and Rome they spread northwards and westwards; and they are found sporadically in Hawaii, Fiji, and parts of Melanesia, and among the Battaks of Sumatra; though in the latter case it must remain doubtful whether it should not be ascribed to the Hindu influence which is evidenced by temple ruins in the interior of Sumatra.[2]

Market Peace.—There is considerable specialisation of industry even in the lower stages of culture, and among the tasks which fall to the lot of woman is the provision of vegetable food; it is therefore in no way remarkable that women are more numerous than men in the primitive market; in Africa another cause—the neutrality of women—has also operated to produce this predominance of women, but there is no reason to suppose

[1] See Schurtz, *Die afrikanischen Gewerbe.*

[2] See Lasch, *op. cit.* p. 702, etc.

that it operated in other areas. This neutrality of women is naturally connected with the question of the origin of the market peace; it has been maintained by Brunner and others that the market peace was in its origin the peace of God, and only later took on the character of the King's peace.[1] It is certain that in Mexico, Nicaragua, among the Sabæans and in Greece the market was connected with temples or religious monuments;[2] it is equally true that especially in Europe the fair is closely associated with religious festivals; and it is clear that the peace of the fair may have been transferred to the market, which is in the greater part of Europe a later phenomenon.

Market Tree.—Lasch has argued for a connection between the trees which so often shade the market-place and the market peace, through the intermediate stage of a tree cult.[3] But on the whole it may be said that he has produced no positive evidence in favour of this view. In Europe and Africa the deities associated with the market-place were not specifically tree deities; on the Congo a part of the sanctity of the market tree was perhaps due to the fact that Maluango's body rested beneath the tree on its way to burial; at the same time the number of trees so affected would naturally be small. Mr. Dennett informs me that the market tree generally in the Lower Congo bears a sacred character; but from this it must not be inferred that there was a tree cult proper; worship of the market tree was certainly unknown, and it is at least possible to argue that its sanctity was of a secondary character and connected with that of the trees beneath which the corpse of Maluango reposed. It is obviously quite natural that in tropical regions the market should be held in the shade of a tree; in the woodlands of Kamerun this is perhaps unavoidable; elsewhere the tree serves as a landmark for visitors as well as a protection against the torrid sun.

If the market-place was originally the meeting-place of strangers, we readily understand why it should be upon the frontier in Greece and Africa;[4] or, as is the case in Guinea at the present day, midway between two villages: neither party would be anxious to venture too far into strange or hostile territory. In like manner it was as a means of guarding against surprise that in the Congo a hill was frequently selected for the market-place; a similar spot is chosen in New Britain.[5]

Market and Calendar.—An interesting problem is raised by the interval between successive markets on the same spot. There is no reason to

[1] See Huvelin, *op. cit.*; Brunner, *Deutsche Rechtsgeschichte*, **2**, 239, 580–4.

[2] Brühl, *Kulturvölker*, 322; Roman y Zamora, *Respublicas*, 1, 306; *Theophrasti Hist. Plant.* ix. 4; Wellhausen, *Reste*, 87; Schrader, *Handelsgeschichte*, 35; Lubbock, *Origin of Civilisation.*

[3] *Zeitschrift für Socialwiss.* **9**, 710.

[4] Lubbock, *op. cit.*; Landor, *Widest Africa*, **1**, 183; Chavanne, *Reisen*, 120.

[5] Pfeil, *Studien*, 116; *Bull. Soc. Études coloniales*, **2**, 62; *Bull. Soc. Géog. Lille*, 1888, 208; Bentley, *Life*, 53; *Mouvement géog.* 1884, 66; Lemaire, *Au Congo*, 111; Chavanne, *Reisen*, 120; Barth, *Travels*, 3, 382; Pechuel-Loesche, *Volkskunde von Loango*, 231.

suspect that in the case of the seven-day week the market was instrumental in determining its length. But where the market recurs at intervals of three, four, or five days it is by no means improbable that the week is of this precise length because, the markets already existing and being visited on each day in turn, the length of the week was fixed on the basis of the market interval. There is positive evidence for this in East Africa, where the Wajagga name their days after the markets which they visit;[1] and among the Yoruba a custom, to which further allusion will be made below, has called into existence a mode of reckoning intermediate between the week and the month.[2]

The history of the primitive market raises other large problems, such as the development of currency, the relation of the market police to the general provision for the maintenance of law and order, and the relation of the market tax to regular taxation, not to speak of such minor points of interest as the law of sale in market overt[3] and the regulation of prices in the market. But these questions must be postponed for a more extended review of the history of primitive trade.

THE AFRICAN MARKET.

Distribution and Origin.—Turning now to Africa, it may be said that, broadly speaking, the market is known all over Africa[4] north of the Equator, and perhaps as far as 5° south. In the west the Congo area seems to be the southerly limit; in the east, the Bondei country; in the centre it has been recorded in Lunda, Bihé, and other parts, but here it is more sporadic in its occurrence, and is in some cases at least due to Arab influence.[5]

At first sight it might appear probable that Semitic influence is needed to account for the distribution of the market in Africa generally; and it is certainly curious that there should be none in the south-east and south. But as we have already seen, Herodotus reports that the Carthaginians exchanged their wares for gold beyond the Pillars of Hercules; when the adventurers had returned on board their ships after depositing their goods on the shore, the natives came down and laid beside the wares as much gold as they held them to be worth; if this satisfied the expectations of the voyagers, the matter was settled; if not, the latter withdrew again, and so on.[6]

[1] *P.M.* Erg. Heft **129**, 25.

[2] P. 105 *infra*.

[3] Jolly, *Recht u. Sitte*, 110; Torquemada, *Monarquia*, **14**, 16; cf. Spieth, *Ewe-Stämme*, 668; *Zeitschrift für Socialwiss.* **9**, 778. In some parts the market commissioners inquire whether goods are stolen before permitting them to be sold; see Lenz, *Timbuktu*, 256; but in Berbera stolen goods were openly sold and apparently the loser had no redress; *P.M.* Erg. Bd. **10**, 37; Magyar, *Reisen*, 265; Pogge, *Im Reiche des Muate Jamvo*, 136, etc.

[4] For exceptions see Winterbottom, *Sierra Leone*, **1**, 172; Thonner, *Afric. Urwald* 33; Munzinger, *Ostaf. Studien*, 519, etc.

[5] *J.A.I.* **25**, 204, etc.

[6] Herodotus, ii. 196; see also Grierson, *op. cit.*; Lasch in *Zeitschrift für Socialwiss.* **9**, 623-7.

Silent Trade.—This, it is true, is a description of the silent trade; these native traders were men, and it is *prima facie* not connected with the women's market; but we can hardly suppose that the latter did not precede the former kind of trade: international trade presupposes inter-tribal trade.

It has sometimes been assumed that the market originated in the silent trade; but there is no evidence that the women's trade ever took this form, the so-called depôt trade apart:[1] nor is it clear that the silent trade as a form of intercourse either with neighbours or people from a distance was due to the hostility of the parties concerned. True, feuds are frequent in Africa, and in the Congo the chief will often "knock the fetish" that his men must kill the people of a certain village when they see them;[2] but there is no evidence that this leads to silent trade with that village; and in the Congo area the pygmies alone seem to practise this form of intercourse;[3] besides which, the women are not involved in the spell wrought by the chief to compel his men to kill his foes. As will be shown below, the women are in East Africa expressly exempted from attack, even when two villages are at war, and the men perhaps actually fighting.

The Week.—Against the theory of Arabic origin of the market in Africa tells also the fact that, whereas the Mohammedan week is, like our own, a seven-day one, derived perhaps in the first instance from Babylon,[4] a four-day week is prevalent on and north of the Congo, in East Africa, and on the coast of Guinea; five- and six-day weeks in Kamerun and Guinea; and markets every three days in East Africa.[5] Probably the ultimate grounds for the length of the interval between successive markets are (1) the number of markets which it is possible to visit from a given centre, and (2) the length of time which the provisions there purchased will

[1] Dennett, *At the Back of the Black Man's Mind*, 193.

[2] MS. note from R. E. Dennett.

[3] Burrows, *Land of the Pygmies*, 188.

[4] Hastings, *Dict. Bible*, **4**, 766, but cf. *Enc. Bibl.* and *Jewish Encycl. s.v.* Week; on the market and the calendar, see *Zeitschrift für Socialwiss.* **9**, 764-6.

[5] (Four-day week) Hutter, *Wanderungen*, 266, 360; Bentley, *Pioneering*, 399; Bastian, *Loango-küste*, **1**, 209; Krapf, *Travels*, 25; Fitzgerald, *Travels*, 111; Plehn, *Beiträge*, 9; Spieth, *Ewe-Stämme*, 311; Allen and Thomson, *Narrative*, **1**, 388; Isert, *Neue Reise*, 132; Monnier, *France noir*, 209; Binger, *Du Niger*, **1**, 370; Ellis, *Yoruba-speaking Peoples*, 149. On pp. 143, 145, Ellis speaks of a five-day week and gives the names; probably more than one god is worshipped on a given day, and the week has really four days. Dennett finds a four-day week; while Johnson (Dennett, *op. cit.* 245) gives the names of five days; but cf. p. 251, where a four-day cycle is mentioned. (Five- or six-day week) *Mitt. Geog. Ges. Jena*, **8**, 115; Wissmann, *Im Innern*, 248; *Mitt. aus den deutschen Schutzgebieten*, **11**, 128, 156; Adams, *From C. Palmas*, 88; but the latter case is somewhat doubtful, as mistakes are frequent in dealing with the calendar; thus many observers say that the market is "every five days" when they mean "every fifth day." (Three-day week) *P.M.* Erg. Heft **129**, 25. It is stated of the Bawenda (*J.A.I.* **35**, 382) that they have a six-day week, but only three days have names; they do not seem to have a market. Northern Europe also seems to have had a five-day week independent of a market; see Troels Lund, *Livsbelysning*; for this reference I am indebted to Mr. A. F. Major.

keep; for it seems clear that the sale of food is the original object of the market. It is probably not merely accidental that in Guinea and the Congo—the two main areas of the native market—the population is often sharply divided into water and land tribes. The specialisation of production thus brought about by natural conditions is a powerful stimulus to exchange; as a rule, in the normal tribe animal food is provided by the man, vegetable food by the woman; and this division of labour is the rule in the ordinary land tribe in the Congo; but for the water people vegetable products are, in general, attainable only by exchange with their neighbours.[1] We have no reason to suppose that the division into land and water tribes is of recent date; and it is natural to assume that the market arose from the necessities of the case rather than as a suggestion from outside.

Location of Market-Place.—From a superficial point of view, we may distinguish three kinds of market, situated (*a*) in or (*b*) just outside a village or town, and (*c*) at a distance from human habitations; but it would be rash to conclude that they originated in different ways or to meet different kinds of needs. The first kind, that held within the town or village, is found mainly in Guinea, the Soudan, and occasionally in the grassland of Kamerun;[2] it is commonly associated with the second kind, which is in addition found on the Lower Congo and Upper Ubanghi as well as in various parts of Morocco.[3] The stranger would not trust himself within the gates of a hostile tribe; hence if a market originally outside the gates became a village market, a second one was needed outside. It is clear that there is a natural tendency for a village, by a natural process of growth, to absorb a market-place just without its bounds; not only so, but it is no infrequent occurrence in Guinea for two tribes to share a village. If, as is sometimes the case, the market-place originally lay between two detached portions of a village[4] tenanted by different sections, it is the most natural thing in the world for it to be built round in the course of time. This view of the case is borne out by the fact that in some towns there are two market-places, often of different sizes, within the precincts,[5] and we may conjecture that the second outside market-place, established after the first was swallowed up, has in like manner become an inside market; in this connection it is worthy of note that the difference in the size of the market-places is precisely

[1] François, *Erforschung*, 75; *Bul. Soc. belge géog.* **15**, 122.

[2] J. Duncan, *Travels*, **2**, 63, 116; Purchas, *His Pilgrimes* (1906), **6**, 357; *Jl. Manch. Geog. Soc.* 1893, 40; Nachtigal, *Sahara*, *pas.*; *Mitt. d. Schutzg.* **7**, 103; Passarge, *Adamaua*, 85; Bastian, *Loango-küste*, **1**, 100, 209; but the town of Boma, of which Bastian speaks, is European; see also *Zeitschrift für Socialwiss.* **9**, 711, 89.

[3] Duncan, *op. cit.* 63, 114, 153; Lenz, *Timbuktu*, 34, 154; *Bull. soc. belge*, **17**, 36; Thonner, *Urwald*, 8; Passarge, *loc. cit.*; Bastian, *loc. cit.*; B. Anderson, *Narrative*, 104, 109; cf. Junghuhn, *Battaländer*, **2**, 228.

[4] Binger, *Du Niger*, *pas.*; Barth, *Travels*, **5**, 377.

[5] R. and J. Lander, *Journals*, **1**, 179; Clapperton, *Journal*, 177; Duncan, *Travels*, **2**, 17; Purchas, *loc. cit.*; Pinkerton, *Voyages*, **15**, 735; T. J. Hutchinson, *Impressions*, 122; Passarge, *Adamaua*, 85.

what we should expect if with the growth of population a second market-place was established to replace the one engulfed by the village.

In like manner a market remote from the dwelling-places of man may become the centre of a village. We have already seen that Berbera, deserted for some months in the year, is for the rest of the twelve months a populous place; it is expressly stated that Nyangwe was originally populated by traders, Arabs, or slaves,[1] and that the market held there was in the first instance of the same kind as those held in the district at a distance from villages. This, as we have seen, was probably the primitive form of the market.[2] The Hause markets are frequently on caravan routes, a significant location.

Creation of a Market.—The foundation of a market is not a matter to be lightly undertaken, for there are vested interests to be considered. The Kabyle market is tribal property, sometimes the joint possession of two tribes, and the cost of the land on which it is held is divided between the villages; before a new market is set up the consent of neighbouring tribes must be obtained. To this rule there is one exception: when war breaks out, those tribes which have no market on their territory are compelled in self-defence to set one up; it is held on the same day as the one which it replaces; but as soon as peace is concluded the rights of the owners of the original market are revived and the new one is dissolved in its favour.[3]

Origin of a Market-Place.—As to the customs attending the foundation of a market in Guinea and the Soudan, little or nothing has been recorded; but it is natural to suppose that it is a less formal matter where it is so closely associated with a village, and where, in consequence, vested rights are less involved. On the Congo and in East Africa there is no evidence that existing markets claim any right of veto on the creation of a new one; in these areas religious or magical rites accompany the foundation of a market; thus, among the Bondei, after the elders have come to a preliminary agreement, a magician is summoned and they proceed to the open space designated as the site; and the magician sets up magical objects at every road leading into it.[4]

According to one authority the market in the Congo is now created by

[1] Cameron, *Across Africa*, 288; cf. Lenz, *Timbuktu*, **2**, 148; Wellhausen, *Reste*, 87.

[2] For markets of this type see Stanley, *Dark Continent*, **1**, 167; Hanoteaux and Letourneux, *Kabylie*, **2**, 77; Boyd Alexander, *From the Niger*, **1**, 267; Bentley, *Life*, 53. Cf. Haddon, *Headhunters*, 265; Pfeil, *Studien*, 117; Niehbuhr, *Arabien*, 28; Pistorius, *Studien*, 13. It may perhaps be well to note that even in this class of market-places remote from villages two types can be distinguished. In parts of the Congo the spot is strictly neutral and *res nullius* as long as it serves the purpose of a market-place (Stanley, *Dark Continent* **1**, 167-8), but is more often the property of a chief, who may collect dues and usually makes himself responsible for maintaining order; in Kabylia we find a variant of the second type, for the market is owned, but is vested in the tribe and not in any individual.

[3] Hanoteaux, *loc. cit.*

[4] *J.A.I.* **25**, 231.

a simple agreement in the presence of witnesses, and a gun is buried in token that no arms may be brought to the market.[1] But higher up the Congo there are traces of darker rites; Saegher says that at Stanley Pool a slave was formerly sacrificed when a new market was founded;[2] and this is borne out by Coquilhat's evidence as to a Bayanzi custom, which required that when two villages made an agreement as to the price of food, a slave should be buried in a trench between the two places; his legs and arms were broken and none might give him food or drink.[3] Probably the same custom prevailed on the Lower Congo at an earlier date; all contracts had to be sealed by blood.

The precise significance of these rites is not quite clear; but we must certainly distinguish them from those which prevail when a "dead" market is revived, after it has been closed for a time owing to a deed of violence. On the Congo this involves an assembly of the local magnates and the contribution of a pig by the town to which the market belongs; this is divided up among the towns represented—a common feature in piacular sacrifices in this area. If possible the culprit who caused the disturbance, or if he is a wealthy man his substitute, is seized and burned or buried alive; or, if other ways of killing are resorted to, his skull is set up on a post in the market-place "to strengthen the law."[4] In the Bondei country a breach of the peace is atoned for by payment of a fowl, but this seems to be of the nature of a fine, rather than a piaculum.[5] Similarly the execution of the culprit on the Congo is perhaps rather a punishment than a repetition of the foundation rites, which have been interpreted as an offering to the chthonic deities, but resemble more closely a ceremony for the creation of a guardian spirit of the market-place.

It tells perhaps in favour of this view that among the Ewe there is a belief that a *tro* or spirit, Asi, is the guardian of the market-place and upholder of the market peace;[6] at the same time there is no evidence that they attempt to create spirits of this sort by the sacrifice of human beings.

Elsewhere there is less reason for connecting the market peace with religion, but most observers agree that it is seldom violated, thanks either to the force available to repress it or to the self-control of the assembly. It has been suggested above that the markets owe their origin to the need of intercourse between tribes at feud with one another; all observers agree that hostile tribes can and do visit markets without let or hindrance; and even if it is not correct to regard war as the normal state of races in the lower stages of culture, hostilities are at any rate sufficiently common to make the market peace of no small importance in this direction.

[1] Dennett, *op. cit.* 48.
[2] *Bull. Soc. Études col.* **2**, 62.
[3] Coquilhat, *Sur le Haut Congo*, 85.
[4] Bentley, *Pioneering*, 399; cf. Dennett, *op. cit.* 157.
[5] *J.A.I.* **25**, 231.
[6] Spieth, *Ewe-Stämme*, 668, 670; cf. Purchas, **6**, 289.

Among the Hausa, at any rate, the market-tree is not an object of cult; as in private houses, so in the market-place is a pole, in the latter case twenty feet or so in height, and the sacrifices offered in private houses are made near this *jigo*; it is therefore on the *jigo* and not on the baobab tree that the sanctity of the market depends.

It might of course be argued that the *jigo*, which may be planted only by the chief of the market, usually the chief butcher (Sarkin Fawa), is the representative of a tree and that therefore the Hausa custom supports Lasch's view; but certain objects are buried at its foot, among them four stones at the four points of the compass—perhaps to ensure the stability of the market—and this reminds us rather of the Bondei rites than of the setting up of a tree to be worshipped. The point is, however, one on which more information is needed, and my friend Mr. H. R. Palmer, to whom I owe this information, has promised to investigate the matter further. He adds that if the *jigo* falls down, the market would probably be abandoned.

Woman in the Market.—We have seen that woman is the chief producer of vegetable food in Africa; she is also the potter;[1] and her virtual monopoly of these important branches of industry is in itself sufficient to account for the fact that in the ordinary African market-place the female sex is vastly in the majority. But it is possible that another cause has contributed to this predominance of women; for among the Masai, the Wakikuyu, and the Wajagga in East Africa, men are not permitted to go to market on any pretence whatever.[2] War is, of course, the business of the stronger sex; and this exclusion of mere man from the market-place is probably a measure of precaution against disorder. Be this as it may, it is definitely asserted that a treaty exists between the Masai and the Wajagga which enacts that women are to go to market unharmed even when the tribes are at war. Livingstone, moreover, observed on the Lualaba that women went to market unmolested although the men were at war;[3] the East African custom is therefore not an isolated case. In this connection it is worthy of note that women frequently act as ambassadors in East Africa;[4] this may be either the cause or the result of her freedom from molestation during her commercial transactions. In either case it seems probable that the favoured position of women would make commercial transactions possible, even when warfare was more frequent and man could not trust himself to keep the peace as he does to-day when

[1] Schurtz, *Af. Gewerbe.*

[2] Thomson, *Masailand*, 93, 177; v. d. Decken, *Reise*, 1, 300; Volkens, *Kilimandjaro*, 239. In Nicaragua the men were forbidden to appear on the market-places of their own towns, but might visit the markets of towns speaking the same language; see Bancroft, *Native Races*, 2, 737. It is not uncommon for men to accompany women for their protection and to remain outside the market; see Haddon, *Headhunters*, 269; *Proc. R.G.S.* N.S. 2, 611. In Itsha, though men sell goods, only women pay dues; Lander, 1, 96, 148; cf. Steinmetz, *Rechtsverhältnisse*, 266.

[3] Livingstone, *Last Journals*, 2, 156. [4] Stuhlmann, *Mit Emin Pascha*, 391.

he meets his enemies on the market-place. If, as suggested here, the market was originally founded by women, or, at least, frequented by women only, we might expect to find traces of the fact in market customs; it is, therefore, not surprising to learn that when a thief is caught in the act in the Congo area, the punishment prescribed for the offence by market law—stoning to death—is inflicted by the women.[1]

It may be noted in passing that the market-women in parts of West Africa wield great influence; a chief cannot give effect to his views if the market-women do not share them, and an English District Commissioner who failed to get what he wanted from a chief has been known to threaten to carry his point by an appeal to the market-women.

Crimes and Punishments.—Not only are the market-places and the roads to them neutral ground for tribes at war, but private feuds are also suspended upon the market-place itself, and, as a rule, on the way to and from the market. Thus, it is forbidden to seize a debtor or other "pawn," blood revenge may not be taken, nor old scores paid off.[2] An exception to the strict rule of neutrality is found in Berbera, where disputes cannot indeed be settled on the market-place itself by an appeal to arms, but contending parties are permitted, if they do not care to submit their cause to the judgment of the market council, to withdraw to the beach and settle their disputes with spear and dagger.[3]

With the subject of the market peace is naturally bound up that of the means by which it is upheld and by which penalties are inflicted for other offences such as stealing, false measure, drunkenness, and the like. As a rule this is the business of specially appointed officials or of the local authorities of the district; but in certain cases the market law is enforced by the general body of people attending the market. It has been already mentioned that at Stanley Pool a thief was stoned by the women; his head was placed on a pole as a warning.[4] Saegher, who reports this, states that in some markets offences are punished by burial alive; but it does not appear from his account whether this was a piece of mob law; perhaps from the fact that a kind of interregnum[5] followed where the market law had been infringed and no culprit punished, we may conclude that here too the upholding of the law was committed to the general body of people in attendance.[6] Robbery, assassination, rape, and all kinds of crimes were permitted and the wrong-doers incurred no personal responsibility; for, by one of those singular

[1] *Bull. Soc. Ét. col.* **2**, 62.

[2] Spieth, *loc. cit.*; Bentley, *Pioneering*, 399; *Bull. Soc. belge Géog.* 1886, 397; Dupont, *Lettres sur le Congo*, 161, 343.

[3] *P.M.* **10**, 37; Burton, *First Footsteps*, 409.

[4] *Bull. Soc. Ét. col.* **2**, 62.

[5] For pillaging the market at an actual interregnum, see *Mitt. aus den d. Schutzgeb.* **17**, 123; for customs at interregnum see *Année Soc.* **10**, 83.

[6] *Bull. Soc. Ét. col.* **2**, 91.

turns of native custom which surprise us by their apparent unreasonableness and practical effectiveness, the task of paying damages for all the misdeeds falls upon the family of the original violator of the market peace.

Among the Kabyles, market law, which is distinct from village and family law, is likewise enforced by this method of popular justice; but in this case the rule is tempered by the possibility that the culprit may be judged by the "chief of the market," who deals with criminal cases and also executes the judgments of the civil court. Offences such as theft, attempted murder, violation of the fast of Ramadan, etc., put the offender outside the law; any eye-witness may fall upon him, uttering a cry in so doing to summon others to his assistance, and the offender is stoned to death. Here, as elsewhere,[1] however, tribesmen are anxious to prevent actual shedding of blood, which discredits their market, and the actual executioners are strangers. A suspected thief is, however, seized by the tribesmen themselves to be brought before the "chief of the market," who only hands him over to the mob when his crime is a really serious one. The culprit may also be rescued from the hands of the crowd by influential men; in this case his clothes are burnt, his hair and beard shaved off, and he is driven away with yells and showers of stones. If neither of these things happens, the chief of the market fines the offender, and, where he is in danger of falling a victim to popular indignation, conducts him in safety to a neighbouring mosque, which is of course an asylum for fugitives. Here, as in Somaliland, it is the rule that the tribesman who offends must suffer more heavily than the stranger; for he is presumed to be better acquainted with the usages of the market and is moreover acting against his own material interests and those of his fellow villagers.[2]

Judicial Customs.—Popular justice is, however, the exception; as a rule we find that order is upheld and justice administered by the chiefs or by special officers with powers of summary jurisdiction. Where, as on the Upper Ubanghi, the men retain their spears, leaving only their shields in the hands of a comrade, the authority of the chief is doubtless limited and bloodshed sometimes results.[3] Among the Baluba, Wissmann found the chief himself acting as guardian of the peace; with half a dozen attendants, each of whom bore the broad axe upon his shoulder, he paraded the market-place, and made his way to any spot where loud voices gave warning of an impending quarrel. The African chief is often a magician, and perhaps the appearance of this Baluba chief in the market was intended to uphold the peace by the aid of religion as well as by the civil power which centres in him; for in one hand he bore a "fetish" horn, *i.e.* one to which magical powers were attributed, in the other a calabash filled with stones, which is likewise an attribute of the magician.[4]

[1] Hanoteaux, *op. cit.* 2, 81; *P.M.* 10, 37.
[2] *Ibid.*, *op. cit.* 3, 302.
[3] *Bull. Soc. belge Géog.* 17, 26.
[4] Wissmann, *Zweite Durchquerung*, 99.

Police.—In the Aruwimi district armed men act as police, doubtless under the direction of the chief of the village.[1] Among the Kabyles there is, as we have seen, a special market chief, who is assisted by influential men whom he must consult; he is himself a member of a powerful family. His agents parade the market and bring him word of what is going on.[2] In Garo-n-Bautschi Rohlfs found a similar official, there known as "sultan of the market." In Maidugari (Bornu), Boyd Alexander found a market king, whose function it was to regulate disputes.[3]

Officials of the Market.—In West Africa on the St. Paul's River specially appointed officials paraded the market-place, long staves in their hands, and ordered every one to sit down; this done they admonished the people to make their bargains peacefully and declared the market open.[4] At Quampanissa constables were employed by the king to keep order, and they carried immense thongs of bullock's hides fastened on a handle as a means of enforcing their authority.[5] At Whydah the king employed a commissary whose function it was to parade the market incessantly, accompanied by four constables, and to hear complaints, settle differences, and sell into slavery on the spot all offenders against the market peace.[6]

In some cases the same officials undertake the task of preventing adulteration or fraud. According to Proyart precautions were unnecessary on the Congo, for all goods were divided into packets of invariable size and the quality was practically the same in all cases; but the *m'fuka* supervised trade between Europeans and natives.[7] Elsewhere both quality and quantity of goods were subject to supervision. Thus, at Garo-n-Bautschi milk was examined for adulteration; [8] among the Kabyles official measurers, paid by a percentage, inspected the pots and broke false measures on the head of the delinquent.[9] At Fez and other places in Morocco commissaries examined animals, certified that they were not stolen,[10] and as a rule concluded the sale, receiving a percentage; the soundness of an animal was also certified by a veterinary surgeon.[11] Elsewhere in Morocco an officer fixed the prices and saw that no one overcharged; offenders were flogged through the market.[12] At Whydah the currency was under the especial charge of an official known as the *conagongla*, who punished attempts at fraud by confiscation. Among the Galla the *abba mizân* controls the market and the currency.[13]

[1] *Bull. Soc. belge Géog.* **17**, 26.
[2] Hanoteaux, *op. cit.* **2**, 80.
[3] Alexander, *From the Niger*, **1**, 267.
[4] Anderson, *Narrative*, 79.
[5] Duncan, *Travels*, **2**, 115.
[6] Labat, *Voyage*, **2**, 202. One method of ensuring order is to prohibit the sale of alcohol; *Geog. Jl.* **4**, 131; Binger, *Du Niger*, **1**, 318. For drinking habits see *Bull. Soc. belge Géog.* **15**, 122; *Mitt. d. Schutzgeb.* **11**, 136; *J.A.I.* **25**, 204; *Bull. Soc. Geog. Lille*, 1888, 208; De Bry, *Ind. Orient.* **6**, 36; Churchill, *Collection*, **5**, 269.
[7] Proyart, *Histoire*, 159.
[8] *P.M.* Erg. Bd. **7**, 56.
[9] Hanoteaux, *op. cit.* **2**, 79, 80.
[10] Lenz, *Timbuktu*, 155, 256.
[11] *Ibid.* 155.
[12] Pinkerton, *Voyages*, **15**, 709.
[13] Labat, *loc. cit.*; Paulitschke, *Ethnographie*, **2**, 172.

Market Dues.—Some markets seem to be entirely free;[1] in others a tax s levied either for the benefit of the king or chief or to pay the officials. We hear little of taxes in West Africa and the Soudan;[2] and among the Kabyles the only tax payable is for the benefit of the communal school, but as mentioned above, the measurers collect dues; the fines imposed by the chief of the market go to the upkeep of the place, roads, well, etc.[3]

In East Africa the Bondei chief was formerly authorised to collect a percentage, and his people stood in fours at the spots where the roads opened upon the market-place and took one of each object brought for sale from all who came to the market.[4] Among the Baluba the chief already mentioned collected tribute in person; accompanied by the shouts of the multitude, he danced on a spot reserved for him, and at the conclusion of each dance a woman approached him dancing and laid before him the contribution exacted from her village.[5] In Nyangwe the tax varied from 10 per cent. to 16 per cent., and was payable before the seller took up his or her position.[6] In the Aruwimi area the collection of the tax is effected by the whole body of villagers, who encircle the market-place and exact about 5 per cent. on each sale before the goods are taken from the market-place.[7] In Gori (Adamaua), an official collected 10 per cent. on each article brought for sale, of which two-thirds went into his own pocket, one-third to the king; a poll-tax was also levied on canoe-men.[8] At Quampanissa the constable was paid by a tax in kind on food, and in cowries on other goods.[9] A tax for the benefit of the chief was very general in the Congo area.[10]

Whatever its origin, a custom recorded by Binger from Bobo-Dioulasu works out in practice as a tax on goods exposed in the market. A pole some four feet long was carried round, decorated with fragments of cloth and hens' feathers; the bearer was accompanied by a drummer. The pole was set down before each seller of goods with due ceremony, and with the aid of a little calabash its owner helped himself to whatever was for sale—millet, rice, salt, soap, etc.—without a protest on the part of his victims.[11] As the custom is stated to have existed before the arrival of the Mandingo, we shall probably be right in supposing that it is a survival of an ancient impost which has been kept up by a people now subjugated.

Agents and Brokers.—These are of course not the only imposts on trade; in North-east Africa and to a less extent in the centre and west each foreigner

[1] Staudinger, *Im Herzen der Haussaländer*, 527.

[2] But see Passarge, *Adamaua*, 87; Allen and Thomson, *Narrative*, 2, 84; Lander, *Journal*, 3, 57.

[3] Hanoteaux, *op cit.* 2, 82.

[4] *J.A.I.* 25, 231.

[5] Wissmann, *Zweite Durchquerung*, 99.

[6] Id. *Unter d. Flagge*, 179, but this was an Arab market.

[7] *Bull. Soc. belge Géog.* 15, 122.

[8] Passarge, *Adamaua*, 87.

[9] Duncan, *Travels*, 2, 115.

[10] Bastian, *Loango-küste*, 1,100; Proyart, *Histoire*, 125; Chavanne, *Reisen*, 129; Lamotte, *Chez les Congolais*, 116.

[11] Binger, *Du Niger*, 2, 371.

is obliged to have a paid patron through whom he does his business;[1] but as this practice has little or nothing to do with the market as defined for the purposes of this paper, it is unnecessary to go into details. Boyd Alexander, however, records a curious parallel from Maidugari, where the women sellers in the market elect a queen to protect them; he adds that it is not the custom to buy directly from the women's stalls and nearly all transactions are carried on through the queen;[2] but unfortunately we learn nothing as to the reasons assigned for this strange reversal.

The Market-Place in Social and Political Life.—Another side of the life of the market must now claim our attention. The peace which makes it possible for hostile tribes to trade with each other designates the market as the natural meeting-place for those who have differences to discuss. In the Berbera market, it is true, this settling of disputes is expressly forbidden, as being too dangerous; but then in this area it is the custom to come armed to market.[3] On the Congo, on the other hand, the reverse is the case; Saegher tells us that the market serves for the discussion of differences; here too the ransoms of prisoners of war are paid;[4] and Wissmann tells us that the market at Nyangwe served especially for the discussion of business and of controversial questions.[5]

Public Announcements in the Market-Place.—Tribal affairs are also discussed, notably by the Kabyles;[6] and the great concourse of people makes it natural that any matter for which special publicity is desired should be brought to the knowledge of the assembled crowd. On the Congo contracts are proclaimed to the sound of the double gong; lost slaves are cried; hostages are marched about prior to being set free; thefts are advertised, and so on. Naturally affairs more purely personal are also settled; a chief recruits his clientèle, just as in Europe a farmer hires his hands at the fair; and a man chooses a wife at the market.[7]

On the other hand, public notices are also proclaimed in the market;[8] executions take place there in the Congo; and the poison ordeal is administered, any such fête attracting large crowds. Where the accused was declared innocent a procession was formed in which umbrellas formed a conspicuous feature and honour was done to the ex-prisoner in the face of all the people.[9]

Co-operative Societies.—Among the contracts proclaimed on the market-place that by which is formed the association known as *temo* calls for special mention. Men agree to act jointly in business or the chase, or form a society for the purchase of wives. In the latter case the young men meet every

[1] *P.M.* Erg. Bd. **10**, 36, 38; Munzinger, *O. A. Studien*, 121; Denham and Clapperton, *Travels*, **2**, 53; Binger, *Du Niger*, **1**, 372; Staudinger, *op. cit.* 223.

[2] Alexander, *From the Niger*, **1**, 267.

[3] *P.M.* Erg. Bd. **10**, 37. Cf. Landor, *Widest Africa*, **1**, 164, 183.

[4] *Bull Soc. Ét. col.* **2**, 62.

[5] Wissmann, *Unter d. Flagge*, 179.

[6] Hanoteaux, *op. cit.* **2**, 77.

[7] *Bull Soc. Et. col.* **2**, 62.

[8] Staudinger, *Im Herzen*, 615.

[9] Bentley, *Pioneering*, 399.

four days and contribute a certain quantity of mitakos; when they have enough they play for the pool thus collected and the winner takes the whole; as soon as all the members are provided with wives the association is dissolved. In like manner women form societies for joint cultivation, which in Africa is the task of the weaker vessel, whose muscles in reality are often superior to those of her lord and master.

There are of course penalties for members of a *temo* who fail to meet their engagements: a first offence is atoned for by the gift of a goat, which is eaten by the *temo*; a second lapse from the strict code of honour exposes the delinquent to loss of his liberty; he may be sold as a slave, or in his absence his goods, wives, and children may be seized and sold in his place.[1] Among the Yorubas a similar kind of association—the *esu*—is found, and from the west coast of Africa it has migrated to the Bahamas. Members meet every fifth market day, *i.e.* at intervals of seventeen days; and from this custom has arisen a secondary mode of computing time, viz. by a seventeen-day period.[2] I hope to deal elsewhere with the origin of the African week; suffice it to say here that the practice just mentioned suggests that it may be the market which gave rise to the week rather than a pre-existing week which regulated the frequency of the market.

Conclusion.—With the economic side of the market the present paper is not concerned; I likewise pass over a number of points such as the hour of the market,[3] the use of sign language in concluding bargains,[4] the ordering of the market, and other questions which, if they are not exactly economical, are likewise not juridical nor connected with the market in its relation to the corporate life of the people. I make no excuse for passing over without comment the resemblances and differences between the African market and those of mediæval Europe. Many of the problems which arise in connection with the latter find no solution in what we learn from the latter; for the African view of law is essentially different from our own. It would, for example, be unintelligible to inquire whether the market peace in Africa is or is not a development of the king's peace; for though we find that among the Barotse the royal drums serve as an asylum for criminals,[5] the general conception is not one which is familiar to the native African mind. In Africa

[1] *Bull Soc. Et. col.* **2**, 62.

[2] Ellis, *Yoruba*, 149.

[3] (Morning markets) *Bull. Soc. Géog. Lille*, 1888, 208; *Bull. Soc. belge Géog.* **17**, 26; *Mouv. géog.* 1887, 103; Pogge, *Im Reiche*, 136. (Mid-day) Passarge, *Adamaua*, 54; Söllner, *Voyage*, 76. (Evening) *Mitt. d. Schutzgeb.* **11**, 136; Staudinger, *Im Herzen*, 614; cf. Monnier, *France noir*, 209. In Yoruba towns there is a regular evening market for about an hour, as Mr. Dennett informs me; cf. Lander, *Journal*, **1**, 117, 123.

[4] Beke, *Letters*, 19; *P.M.* Erg. Bd. **10**, 37. The custom seems to be widely found in Asia: (Arabia) Burckhardt, *Arabien*, 191; (India) Pyrard de Laval, *Voyage*, **2**, 178; *Travels of Varthema*, 108; Tavernier in *Allg. Hist.* **10**, 542; (Pegu) Kerr, *Collection*, **7**, 198; (C. Asia) Huc, *Travels*, cap. 5; (W. Asia) *Journ. Asiatique*, 1823, 65.

[5] Gibbons, *Exploration*, 129.

the market peace, if it is not religious in its origin, is based upon intertribal agreements, not upon any attribute of the chief.

Among the influences which have civilised humanity a high place must be assigned to the market. It brought enemies together and taught mankind that strangers need not be foes; it must have done much to raise the position of women, at any rate in parts of Africa, not only by enabling her to raise herself to economic independence to a greater or less degree, but also by making her a privileged person, exempt from attack. But over and above this we see in the market the first place where the maintenance of law and order was a public duty and where the local and private feuds, on a smaller scale perhaps than those of mediæval Europe, but no less injurious in their effects, were suspended before the majesty of the law.

Note on Caravan Trade and Caravan Law.—A distinction has been drawn above between caravan trade and the market, between "Fernhandel" and "Nahhandel," to adopt the terminology suggested by Schurtz. It is natural that long journeys should be undertaken mainly by men, who are, as a rule, better able to protect themselves, even if, in Africa, it is hardly the fact that they are physically superior to the women. At the same time we find women in West Africa travelling from market to market precisely as do men in the Congo, and this practice, clearly distinguishable from the ordinary visits to a series of markets, which are commonly so arranged that it is easy to visit a number from any single village, is at the same time not precisely parallel to the caravan trade; for not only is it not a single journey, lasting, it may be for months, and not repeated within the same year, but also whereas the caravan is composed of a body of men, with special caravan law, etc., the women seem to travel from place to place like ordinary travellers.

But little attention seems to have been given to caravan law and custom, though Haggenmacher gives some details in connection with the Berbera market.[1] Every caravan owner has a patron in each tribe through whose territory he passes; payments for right of way and protection are made to him, and the enemies from whom he has to save his client are the members of his own tribe, for no one would venture to attack a caravan on strange territory. The patron receives a present of one or two dresses and gives in return a sheep and some milk; if the traveller needs camels he can claim them at half price. The leader of the caravan is supreme on the caravan ground; no one may join the caravan without his permission. If weapons are used on the ground the members of the caravan have no fear of blood revenge, even if the disputants are killed—from which we may infer that breach of the caravan peace is settled by summary execution.

[1] *P.M.* Erg. Bd. **10**, 38.

HOBBES AND LOCKE: THE SOCIAL CONTRACT IN ENGLISH POLITICAL PHILOSOPHY.[1]

[*Contributed by* Sir Frederick Pollock, Bart.]

Rudimentary stages of Social Contract.—From very early times we find in various forms the notion that all government and society depend in some sense on the consent the governed. In the fragments of Cicero's treatise on the Republic (better, in English, Commonwealth) there is a definition which had great authority in the Middle Ages:

> Populum autem non omnem coetum multitudinis sed coetum iuris consensu et utilitatis communione sociatum esse.
>
> Not every multitude of men gathered together is a nation, but only such as have agreed to live by common lawful rule for the common advantage.

Augustine refused to accept this on the ground that there could be no true law or justice under a heathen government; but he seems to have been singular in his dissent. Isidore of Seville, in the early seventh century, substantially copied the Ciceronian definition, and it was generally accepted.

Renaissance controversies.—But it was a long time before any one attempted to work out a definite doctrine; indeed it was not possible before the twelfth century, when the revival of learning sometimes called the lesser Renaissance furnished the materials, and a motive was given by the problem, now becoming acute, of the relations between Church and State. At the time of the later Renaissance in the sixteenth century the problems were more acute and much more complex, because (1) practically no one could identify the State with the Holy Roman Empire: (2) the Reformers, still zealous for ecclesiastical authority, repudiated the authority of the Roman church. Thus, at the date of Hobbes's birth (1588) experiments had been made by reforming and anti-reforming publicists with almost every possible speculative combination.

Several questions present themselves:

Who are the contracting parties? on what do they agree? how is the agreement binding? what was their condition before they agreed?

We have to note that there are two quite distinct types of assumed contract. You may suppose an agreement to form a political society—a covenant of commonwealth, *pactum unionis*: this does not necessarily com-

[1] Revised notes of an University Extension lecture delivered at Oxford in 1907.

prise the definition of any form of government or the choice of governors. You may also suppose an agreement to establish a particular form of government and bear faith to it; and this may comprise a mutual agreement between rulers and subjects. This is a covenant of allegiance, *pactum subiectionis*.

Strictly the term *social contract* is applicable only to the former type: but it is impossible to consider the one apart from the other either dogmatically or historically: the distinction between them is important but easily overlooked.

Types of theory: one contract or two?—It is possible to construct political theories requiring one of these types of agreement, or both.

In the first half of the seventeenth century the prevailing view was that there were *two* contracts—of society and of allegiance: and that the latter was a contract of mutual obligation, a bilateral contract as modern lawyers say, between subjects and rulers—a contract therefore which either prince or people might break.

Historical illustrations were not wanting for either kind of contract. Formal compacts between kings and their subjects were common enough in the Middle Ages, and long before Magna Carta:[1] and in 1620, when Hobbes was still a young man, the Pilgrim Fathers did "solemnly and mutually covenant and combine" themselves "together into a civil body politick" and "promise all due obedience and submission" to "such just and equal laws," etc., as they should make. This of course throws no light on the origin of government, as the subscribing parties were already members of a civilised State and expressly described themselves as loyal subjects of King James I.

But history did not count for very much with the sixteenth and seventeenth century controversialists except as a storehouse of examples to be used in support of foregone conclusions. They assumed[2] that contract was the most binding form of obligation, and therefore it must be the proper foundation of the Commonwealth, in analysis and in morals if not in historical fact.

There was room for plenty of controversy within these limits, especially as to the contract of allegiance.

Did the people surrender their power to the prince, or only commit it to him on terms? and on what terms, if any?

Did the people delegate their authority to the prince, or only appoint him as a ministerial officer?

Did the people act as a corporate body, so that the agreement was between the People of the one part and the King (or other governor or governors) of the other part?

[1] Mr. A. J. Carlyle, *Mediaeval Political Theory in the West*, gives Frankish examples of the ninth century.

[2] Locke, *Civ. Gov.* § 195: Grants, Promises, and Oaths, are Bonds that hold the Almighty.

This last is a question which Hobbes met with the most emphatic negative.

Hobbes and Locke compared.—Comparison of Hobbes's and Locke's theoretical construction of the body politic will show that Hobbes's doctrine was revolutionary, while Locke worked, in the main, on accepted lines and was anxious to appear as following respectable authority. This was perhaps one reason why Locke's influence on the political thought of the next century was so much greater.

Both Hobbes and Locke start from an assumed "state of nature"—a political blank paper. In this they are in no way singular. Observe that their predecessors, being bound to accept the theological doctrine of the fall of man, did not and could not treat the "state of nature" as a golden age. It was the condition of men as fallen, sinful, ignorant and ungoverned creatures. Any virtues it had were negative. Hobbes and Locke, again, are at one in considering the original multitude as a crowd of unrelated individuals: and this is the fundamental fallacy of the Social Contract in every form.

Hobbes's view of "mere nature" is pessimist enough to satisfy any theologian. Without "a common power to keep them all in awe" men "are in that condition which is called war; and such a war as is of every man against every man": and thus there is no security for any life worth living.[1]

The law of nature[2]—*i.e.* the rule of self-preservation dictated by natural reason—dictates to man "to seek peace and follow it," and for that purpose, among other things, to keep faith.

But the law of nature has no adequate sanction.[3] "Covenants without the sword are but words, and of no strength to secure a man at all." From what sort of agreement shall the requisite "common power" be derived?

Hobbes's Original Contract.—The peculiar and fundamental point of Hobbes's construction is the form of his original contract.

There is only one contract: it is a contract of allegiance made not between ruler and subjects, but between those only who agree to transfer all their natural right to the ruler or rulers whom they will henceforth obey. The sovereign thus instituted (not necessarily one person, but in any case bearing the person of the commonwealth) is not a party to the covenant. He promises nothing to the subjects, and is bound only by the law of nature to exercise his power reasonably. His right is derived not from any promise made to him, but from the power conferred upon

[1] Lev. i. 13.

[2] The relation of Hobbes's law of nature to the law of nature as accepted by medieval teachers from Greek or Græco-Roman philosophy and Roman law cannot be considered here. Every one admitted however that there was a law of nature consisting of rules of conduct binding on men simply as rational beings, that it was ascertainable, and that when ascertained it was supreme: except that after the Reformation some Protestant controversialists put the letter of Scripture first under the name of the law of God. Why did they not say at once that they knew as much about the law of nature as the Pope? Because they were still thinking medievally, and wanted a show of superior authority.

[3] Lev. i. c. 17 init.

him. Hence there can be no legal limitation of sovereignty, and to talk of a limited or mixed government comes only of confused thinking.[1]

This single original contract must be classed as *pactum subiectionis* rather than *pactum unionis*.

Hobbes, of course, did not lay down this doctrine merely for the pleasure of speculation. He had a very practical object—to prove that Charles I. was of right and in fact an absolute king. The detailed application is to be found in "Behemoth." Also the practical motive for his conclusions—not only avowed but insisted on—was the conviction that anarchy is necessarily the worst of evils, and any settled form of government, however bad, much better than a revolution.

Locke's Social Contract.—Locke, forty years later, started with a very different practical purpose. Hobbes was the accuser of the Long Parliament, Locke the defender of the Convention Parliament.

Hobbes argued strenuously for absolute power. Locke was abundantly cautious to avoid making any statement or admission which might lead to the inference of absolute power anywhere.

For Locke the state of nature is not a state of war until there is actual hostility, but only a state in which peace is not secure. The natural law of self-preservation includes a moral duty to preserve the rest of mankind so far as possible (Essay, ii. § 6). The natural power of every man has already a moral and even judicial character. Locke is therefore not an unqualified individualist like Hobbes.

Civil society is formed by every man giving up his natural power; not to a sovereign but "into the hands of the Community" or "to the publick." The authority so conferred upon the society is granted only to be used for the public good (vii. § 87).

The next step is that the society, being formed, establishes a government with legislative and executive organs by the decision of the majority. The right of the majority is founded simply on the necessity of the case, because otherwise no collective action would be possible (viii. § 96).

Locke does not say in terms whether he regards this as involving a secondary contract or covenant of allegiance (*pactum subiectionis*), and it is difficult to make out exactly what his formal conception was. It would rather seem that he purposely avoids committing himself. On the whole I submit that he does postulate an auxiliary compact of all the citizens to be bound by the government and laws which the society shall establish (viii. § 122). This compact is not made once for all, but is constantly renewed in the person of every man who becomes a subject and member of the commonwealth by promising allegiance.

[1] Hence, the sovereign not being bound by law, no one law can be more fundamental than another. *Quaere*, what would Hobbes have made of the constitution of the United States, or Switzerland, or Belgium? The attempts of modern followers of Hobbes to account for "rigid" constitutions have been signal failures.

Locke's view that permanent citizenship depends wholly on the individual's consent—and even express consent—is both unhistorical and contrary to all legal doctrine, as any instructed modern reader will easily perceive.

The persons appointed to exercise legislative and executive authority are of course parties to the contract as citizens. But Locke does not affirm, and he seems by implication to deny, the existence of any further special contract between governors or officers of state, as such, and the commonwealth: and this, although the supposed original contract between king and people had been prominent in the debates on the conduct of King James II. and its consequences. Not that Locke would deny that a king or any other holder of public office was bound by any special oath of office or other express undertaking given by him on his appointment and admission. But in a general way he regards the powers of government not as depending on contract, but as held under a conditional grant, or in trust, from the Commonwealth, and subject to forfeiture if the conditions are not observed. Here we have to note the influence of ideas derived from the English law of property. The fundamental condition is that power so granted is to be used in good faith for the common advantage. Locke's development of this into a sort of constitutional code, in which especially the sanctity of property is elaborately guarded against encroachment by the State, is interesting, but we cannot now dwell on it.

The path towards Rousseau.—Thus Locke may be said to prepare the way for Rousseau. Hobbes knew of only one social contract, the covenant of allegiance: civil society is constituted by allegiance to the common power alone. Locke holds (as I read him) that there is a primary covenant of commonwealth and also an auxiliary covenant of allegiance: but the chosen rulers are not, as rulers, parties to that second covenant. Rousseau, with great ingenuity, quitted Locke's lines and framed a theory which may almost be called an inversion of Hobbes's. He abolished the covenant of allegiance altogether, as being superfluous. There is only one contract, the covenant of commonwealth: for the commonwealth which it creates is sovereign, and whatever the commonwealth does is an act of sovereignty needing no farther confirmation. Thus Hobbes recognises *pactum subiectionis* only; Locke (seemingly) both *pactum unionis* and *pactum subiectionis;* Rousseau *pactum unionis* only.

Later British publicists.—Hume had in fact refuted the Social Contract before Rousseau's version of it became known: a version which though more brilliant is no more sound than any other. But this had apparently no effect in checking Rousseau's influence in France: nor did it prevent Locke's political theory, which had become part of the regular Whig tenets, from being generally accepted in England till the end of the eighteenth century.

Blackstone, while obviously under Locke's influence, repudiated, as matter of fact, both the existence of a state of nature, and the formation

of society by "any convention of individuals": thus putting himself to some extent in the right line of criticism. It is very doubtful however whether any of the expounders of a social contract meant to commit themselves to maintaining that states were normally, or ever, created in historical times by an express act of agreement: Locke is interesting and rather peculiar on this point. The doctrine of the Social Contract in all its forms is analytical, not historical.

Hume showed that even as mere analysis the doctrine is useless.[1] It attempts to found political society on the duty of keeping promises. But no reason can be given for keeping the supposed promise of the social compact, or any promise, which is not an equally good reason for maintaining political society and obeying the law, promise or no promise. We have to fall back on "the apparent interests and necessities of human society."

Bentham was fully convinced by Hume's argument, and adopted it in his Fragment on Government (1776). The Social Contract, therefore, has no place in the politics of the English utilitarian school.

Burke in his Reflections on the French Revolution and elsewhere treats it as an absurd and contemptible fiction. I am not aware of any serious attempt to revive it in later times.

[1] Essay xii., of the Original Contract.

THE LEGAL RELATIONS OF THE SEVERAL STATES OF THE EMPIRE.[1]

[*Contributed by* PROFESSOR HARRISON MOORE, *Melbourne University*.]

IN undertaking to read a paper on this subject, I appreciate the piquancy of contrast which its treatment must offer to the broad and lofty sentiments of the paper by Mr. Morris Miller, with which our discussion this year began. A lawyer speaking to a general audience is not likely to be without reminders of the dryness of his matter, even if he were not painfully conscious that he is incapable of doing anything by lightness of touch to diminish the burdens of his hearers. However, those who tackle the problems of Imperial union will not be afraid of strong meat; and I will endeavour not to clog the matter with more detail than is inevitable.

Our starting-point is the separateness of the several parts of the Empire in matters of law. We speak of the incorporate union of England, Scotland, and Ireland—the United Kingdom. But so far as concerns the administration of justice they are separate countries—the law of one in each of the others is foreign law. The same is true of each of the British possessions or dominions—in the law courts, in the administration of justice, each one of them is foreign to the rest, so that its writs or other processes do not run there; its laws have to be proved there as matter of fact, and its judgments can be enforced there only by a new action. We have, indeed, expressed the position when we say that they are foreign to each other—exactly in the same sense as French law is foreign to English law.

That, of course, is not to say that the substance of the law is totally or even greatly different. The basis of the law of most of the colonies, including all the colonies formed by settlement and occupation, is the law of England—the common law, equity, and the statute law up to the date of the settlement. Here, then, we have one great unity—a common fount of law, which may well cause us to pause for a minute. It is not, indeed, co-extensive with the Empire, nor even with the self-governing dominions within the Empire. Scotland, Quebec, practically the whole of South Africa, stand outside it, while all the United States, with the single exception, I think, of Louisiana, come within it. But so far as it extends, this single source or fountain of law is a fact of capital importance

[1] An address delivered before the Imperial Federation League.

if we regard law, as I think we should, as something more than the arbitrary command of a sovereign. It has been well said that "the law of every country is the outcome and result of the economic and social conditions of that country, as well as the expression of its intellectual capacity for dealing with those conditions" (Bryce, 2, 339).

English law, and particularly the English common law, has always been peculiarly a national law—first, in that the welding together of the separate local laws which existed in England, as elsewhere, was a principal factor in contributing to that solidarity which gave to English national life a start of some centuries over any other country in Europe; secondly, because it has always been regarded as *lex terræ*, *lex Anglorum*—it has been sharply conscious of its distinctness from other laws, and of its opposition in spirit to those claims of universal obligation which were claimed for the Roman civil law. Whether either the substance or the form of English law has gained from its aloofness I am not here discussing; I am simply pointing to its claims to be considered a national law, corresponding with and expressing the national spirit. To this we must add the great and exceptional part that English law and its administration have played in the moulding of our political institutions. Lastly, while we are on this part of our subject, it is not amiss to remember that the establishment of German unity was attended with a great revival in the study of the law, and that significantly the Constitution of the Empire embraces within the federal power the whole civil or private law. Many of you will know that a uniform civil code for the German Empire came into force on January 1, 1900.

Here, then, are two cardinal facts—the separateness of the several parts of the British Empire as units of legal administration, and the common stock of legal ideas and institutions throughout the colonies which have been formed by settlement from Great Britain. I propose now to consider our subject very briefly from these two standpoints.

First—the separateness. Throughout the civilised world the separateness of jurisdictions is tempered by the recognition of foreign laws and rights. I make my bow to a current legal controversy, and having done so, I think I may say, without the risk of seriously misleading you, that the aim of the principles which determine this recognition is to secure that any given controversy shall be decided in the same way, irrespective of the country in which the suit may be brought. These principles, for which we have not yet any unexceptionable name, are generally known to English lawyers as Private International Law, or the Conflict of Laws. Unfortunately there is no general agreement as to the rules by which the result is to be attained, and in some respects English and Continental lawyers are further from agreement here than they were fifty years ago. To take a single illustration, English and French lawyers are agreed that a certain set of personal relations should be governed not by the law of the Court in which

the matter happens to arise, but by what they would agree in calling "the personal law." But they differ in what constitutes the personal law. France (and the greater part of Europe has now followed her) says "the nationality," the country of which a man is a subject, and here again it is mainly a political force finding expression through the administration of the law. England says "the domicile."

I could give many other illustrations, but this will suffice. Well, now, within the Empire we have this advantage—that there is practical uniformity in the principles whereby a Court will determine when it should apply its own and when some other law to the determination of a given subject. This uniformity extends to the principles upon which foreign judgments will be recognised; and to a considerable, though not to the same extent, to the principles upon which jurisdiction is assumed. It is, I think you will agree, an advantage to know that where A proposes to sue B for damages for breach of contract, the one rule will be applied to the case wherever the action is brought; one rule will determine the recognition to which his judgment is entitled in other jurisdictions, and in the main there will be similarity in the rules which determine the jurisdiction in which the action can be brought. The advantage will be the more apparent when one adds that these rules of recognition are most prominent in relation to commercial law and the law of the domestic relations, matters in which certainty and, as far as may be, uniformity are especially to be desired.

Now this, such as it is, has been accomplished by the action of the Courts practically without the aid of the legislature at all. Legislation has done a little to make relations closer. As between England, Scotland, and Ireland, the Judgments Extension Acts have made it possible to register in any of those countries a judgment obtained in either of the others, and thereupon to proceed to execution. As between the several States of the Commonwealth, the same thing can now be done under the Commonwealth Inter-State Process Act, 1901, one of the earliest, as it is one of the most useful, of the Acts of the Commonwealth Parliament.

In some matters cognate to the recognition of judgments, something has been achieved—*e.g.* probates, bankruptcy, lunacy.

In the extension of the authority of the orders of Courts beyond the jurisdiction in which they issue, legislation of similar scope to that in the case of foreign judgments has been passed by the Imperial Parliament for the United Kingdom, and the Commonwealth Parliament for the Australian States. Further, by what is a very rare exercise of its power to make general provision for the inter-relation of the several parts of the Empire, the Imperial Parliament has by 22 Vict. c. 20 given power to a Court in any part of the Empire to take evidence upon a requisition made to it in a suit depending in any other part of the Empire; and in the special case of bankruptcy proceedings—by what is perhaps an accident in drafting—all bankruptcy Courts throughout the Empire are required to be auxiliary

to each other, and may upon request exercise all the powers which belong to their own jurisdiction or to the jurisdiction seeking aid. This species of co-operation—the details of which may be studied in the Australian Inter-State Process Act, 1901—is capable of great extension, subject to a certain discretion for the prevention of hardship in particular cases. For this purpose it is desirable—I do not say it is necessary—that a uniform basis of jurisdiction should be agreed on, and that when agreed upon, all proceedings in a Court competent according to that rule should receive the co-operation of those parts of the Empire that adhere to the agreement.

In one department of legal administration—the criminal law—there is provision for co-operation. The principle of jurisdiction in English criminal law is that an offender can be tried only by the Courts of the country in which his offence was committed. This principle—although it does not stand alone in Continental jurisdiction—underlies the whole international practice of extradition. The Fugitive Offenders Act, 1881, provides that a person in any part of the British Dominions who is charged with a crime committed in any other part of the British Dominions may be handed over to the government whose laws he has offended. Thus not merely is there extradition between England and Victoria, but between Victoria and Natal. The somewhat elaborate procedure of the Act is avoided in the case of colonies which are close to one another by the provision that the Crown may group together such colonies, and thereupon they come under a simpler procedure. The Australian colonies were so grouped together until the provisions of the Act were superseded as between the States of the Commonwealth by the Act of 1901.

I turn to another matter—the proof of foreign law, *e.g.* English law in Scotland or Victoria. This is made by the evidence of experts; "even when a code or statute is concerned it is neither sufficient to produce such code or statute, nor is it necessary to produce it when an expert refers to it." For this reason, the (Imperial) Evidence (Colonial Statutes) Act, 1907, is of less importance than appears. It merely dispenses with the necessity for proving the authenticity of Colonial statutes; it does not permit the Court to investigate the colonial law for itself, with the aid of counsel. I should add that, by an Imperial Act of 1859, any Court within the British Dominions may send a case for the opinion of a superior Court in any other part of the British Dominions; while as between the Australian States, the State Laws and Record Recognition Act, 1901, requires all Courts within the Commonwealth to take judicial notice of all statutes of State parliaments, as well as of many of the public Acts and officers of the States; and, in some cases, State legislation goes further and requires the State Courts to take judicial notice of the common law in the other States. So long as our facilities for ascertaining the law of other parts of the Empire are not greater than they are at present, one can hardly venture to suggest any other course than that now adopted without inviting grave risk of error. Each

part of the Empire makes its own provision for authenticating the Acts, judicial and other proceedings of every other part.

I turn now to the second head under which I propose to treat this subject. I have said that we find a common basis through a great part of the Empire in the prevalence of the common law. To some extent this uniformity has been increased by the voluntary adoption or adaptation by most of the colonies of a considerable number of English statutes, so that there is a great resemblance even in their statute law. To take company law as an illustration. It is, we may say, wholly statute law with judicial interpretation. Its starting-point is the English Act of 1862, and a recent memorandum of the Board of Trade published in connection with the Imperial Conference shows us how very closely the colonies and India have followed the English model. The same memorandum shows also in an instructive way under each colony the principal departure from English law, and is altogether an admirable piece of work, constituting a valuable addition to the comparative study of our institutions. I may add as further illustrations the Bills of Exchange Acts, the Sales of Goods Act, and the Partnership Act, where we have availed ourselves of the codification Acts passed by the English Parliament. In all these cases, and in several others connected with the commercial law, the adoption of English law is not confined to settlement colonies—it extends equally to those parts which, like Scotland, South Africa, and Quebec, base their systems on the civil law. It is in the administration of these parts of the law—common in their main features to, at any rate, the United Kingdom and the self-governing colonies—that the services of the Privy Council have been, and are likely to continue to be, most beneficial. They are dealing with a subject-matter with which they are familiar; there are not likely to be special and local conditions to be appreciated; and the authority of the Privy Council as an ultimate Court of Appeal has served to ensure uniformity in the interpretation of the law. Practically there is not likely to be much divergence between the House of Lords and the Privy Council, but it is to be hoped that we may not have long to wait for a fusion of these two tribunals. Let me add that in cases which depend largely upon local conditions, *e.g.* land laws and mining laws—the application of colonial laws which are special and peculiar—there is not the same ideal of uniformity to be attained; the decisions of a distant tribunal have not given the same satisfaction; and it is possible that some solution of the vexed question of appeals might usefully be sought in some such classification of subjects.

If, on the other hand, colonial legislation and Imperial interpretation have to some extent continued the uniformity of laws throughout the Empire, it is not to be denied that colonial legislatures have freely used their powers of separate legislation. We must remember that it is true of laws what Bacon said of houses—they are made to be lived in and not to be looked at; therefore, use is ever to be preferred to uniformity. Still, uniformity is itself

utility, and should not be displaced unless we are assured that some higher utility requires it. There is, in fact, a very large number of divergences in the law which might perfectly well be avoided if draftsmen and legislatures would only set themselves to depart as little as possible from the model upon which in general they are working, even though they may know that they can better the original. I need not, I think, dwell on the enormous commercial importance of uniformity in whatever direction we look. Trade is certainly one of those things which follow the line of least resistance, and trade barriers do not consist solely in tariffs, but may be found in currency, weights and measures, language and law. The more you can reproduce the relations with which a country is familiar, the better are your chances of successfully developing a trade with it.

I have left myself but little time to deal with specific subjects as to which suggestions rather than attempts have been made to secure co-operation or uniformity.

In regard to the merchant shipping laws the position is probably unique. As a matter of history it was long treated as a purely Imperial subject, partly, but not solely, because it may involve international relations. Speaking generally, the usual practice amongst nations is that a ship carries her own law wherever she goes, except that when she is actually in foreign waters she is subject to the local police law. Should any serious inroad be made within the Empire upon this practice, I believe that we should be face to face with a very grave situation, which would be political rather than constitutional in character. That is the only political observation I shall allow myself in this paper. From the lawyer's point of view, I may add that the Merchant Shipping Acts, read with the Commonwealth Constitution, raise very difficult questions as to the extent of the powers of colonial legislatures, questions which it was sought, not altogether successfully, to keep out of the discussions of the Navigation Conference. Patents, trade marks, copyrights, and naturalisation have all been brought forward at Colonial Conferences without any great advancement of discussion. The reason is obvious. They are all of them intricate, detailed, and in some cases require expert knowledge and experience, it may be in administration or in a special business or science. Now this is the least promising thing in the world to be undertaken suddenly by a diplomatic assembly such as met in London in 1887, 1902, and 1907. It is the most promising in the world to be taken up by a permanent commission with its bureau or intelligence department. We have only to turn to the experience of the several International Unions for co-operation in all sorts of matters, from telegraphy to the slave trade. We find that these unions are successful exactly in proportion as their bureaux are continuous, organised, active, and intelligent. Or we may look nearer home at modern parliamentary procedure. It is now a commonplace that the essential and substantive part of legislation is the work of the several administrative departments or bureaux, though this is to some extent obscured by the fact that the

Bill is taken charge of by a Minister who must be a member of the legislature. I cannot doubt that the new Secretariat will have abundance of work to do in collecting and distributing information, in propounding, discussing, and eventually submitting schemes for co-operation, not merely in legislation, but in administrative action. If the preliminary work is well and thoroughly done, I have little doubt that much will be accomplished. There may be great difficulties to encounter, but I do not think it will be found impossible to arrange, *e.g.*, that the registration of a trade mark in any part of the Empire shall be effectual to secure in any part of the Empire the protection of the trade-mark laws existing there.

The task before us, therefore, is of a twofold nature. There is the need for better co-operation in the administration of the law: I refer to such matters as the enforcement of judgments, the recognition of patents and copyrights, the machinery of insolvency and winding-up of companies. This does not at all necessarily involve, though it is of course facilitated by, uniformity in the substance of the law, which is the second great task. It should be part of the work of the new department in the Colonial Office—I have no doubt it is—to establish communication between the several departments in England and the corresponding departments in the colonies; and in this way we may generally arrive at a sort of informal administrative union, which will foster a habit of co-operation entirely in accord with that organic growth in the Empire of which we have heard a good deal. I can imagine great good resulting from closer relations between the parliamentary draftsmen of the Empire and their interchange of views and suggestions. Very much might be accomplished if the leaders of the legal profession throughout the Empire would interest themselves in the subject. We have international associations for the study, the reform, and the uniformity of various matters of law, and it is not creditable to English lawyers that as a body they do not address themselves to the greater problems of the administration of the law and its reform. I would commend the example of the American Bar Association, which holds frequent meetings for the discussion of matters of national or international importance. A great deal of the best ability of every country becomes absorbed in the practice of the law, and wins there a certain obscure fame. It is nothing less than a national misfortune that there are so few opportunities whereby the nation at large may profit from the experience and the capacity of these men. It ought not to be impossible to arrange a Conference of Lawyers of the Empire, to which not merely the governments, but the principal professional organisations throughout the Empire should send delegates. To be nominated on such a delegation would be a distinction which I think few men would decline, so that it ought not to be difficult to get a thoroughly representative gathering.

It has been said that the greatest danger of the Empire is ignorance. Well, it is peculiarly a danger in law, and one which our present arrange-

ments or want of arrangements makes infinitely greater than need be. First, let me give credit for what has been done. Quite recently there has been published by the enterprise of Sir Francis Taylor-Piggott, now Chief Justice of Hong Kong, a collection, which aims at completeness, of all Imperial statutes operating in the colonies. This is the first attempt of the kind, and I can testify to its value as an economiser of time. Then, about thirteen years ago, the efforts of Sir Courtenay Ilbert (then Parliamentary Draughtsman in England and now Clerk to the House of Commons) established the Society of Comparative Legislation, whose Journal, published once or twice annually, gives amongst other things a very full summary of current legislation in every part of the British Dominions, and contains a number of special articles on comparative law and Imperial topics, drawing largely upon the services of men who have been or are in the judicial or official service or practising in India and the Colonies. The whole of the work of the Society, including the very heavy work of editing the Journal, is honorary; but the Journal could, I believe, hardly have continued without the assistance of the Board of Trade, given after experience of its usefulness. Some of the Colonial governments—including, I know, the Government of Victoria—are subscribers for a certain number of copies annually. The object of this Society is almost exactly what I have been outlining in this paper. It aims at collecting and making available for all the legal experience of each part of the Empire; and at collecting and providing materials for a more certain knowledge, both for its own sake and for faciliating the assimilation of the laws. One very important practical object will, I believe, never be achieved without the action of governments; but it is so simple in itself, so vital to any certain knowledge of the law, and so little costly, that we can only marvel at the inertia which keeps on doing nothing to carry it out. The first statement of the objects of the Society says (vol. i. (1896) p. ix): "Efforts will be made to procure the preparation, on some uniform plan, of a satisfactory index of the statutes of each legislature; and perhaps it is not too much to hope that we may one day have a general index of the legislation of the British Empire." Here is a service which requires no revolutionary constitutional changes, would be of incalculable value, and is of infinitesimal cost. We in Australia are, in regard to indexes, the worst of sinners. At the present time the only State which has an index of statutes which is of any practical use is Queensland. In Victoria there is an index, not at all without reproach, from the first to the Consolidated Statutes of 1890; for the years since then we must work by titles of statutes, which every one knows are a most insufficient guide. When one has to refer to the statutes of the other States, one has to work as well as one can with the aid of more or less shrewd guesses, until at last one's patience gives way. May I suggest, in conclusion, that there is no greater service which the Federal Government could undertake at so small a cost, and with so little risk of hurting any susceptibilities, as the organisation of

a uniform index for the Commonwealth statutes and the statutes of the State? If it could be done in co-operation with a general scheme for the Empire, so much the better; but I think every lawyer will agree with me that the lack of a proper index of the State laws is so serious a matter that its remedy should not be delayed.

WAKF AS FAMILY SETTLEMENT AMONG THE MOHAMMEDANS.[1]

[*Contributed by* Syed A. Majid, LL.D., of *Gray's Inn, Barrister-at-Law.*]

Sir Raymond West, in introducing the lecturer, said: "This I believe is the first occasion on which a paper has been placed before our Society by a native of our great dependency in the East. This makes it a most interesting occasion to me and to others who are interested in India and in Indian progress. But an equal interest must be felt by those who desire the furtherance of juristic studies by English-speaking people along practical as well as scientific lines. We cannot but derive advantage from the discussion of jural questions such as arise from time to time in actual experience by those who are themselves subject to the actual laws which our Courts and judges have to learn, conscientiously of course, but as it were at second hand. When, therefore, a gentleman so qualified as Mr. Majid comes forward to give us his views and the views of his co-religionists on the subject of wakf or endowments—a subject which so deeply affects the feelings and interests of the Moslem community—we must accord him a hearty welcome. I see here, besides, several gentlemen who I trust will by their observations afford us still further enlightenment on what is certainly a rather controversial subject. It is one on which English and Oriental ideas are a good deal at variance, and which requires consideration from many various points of view.

"I hope as time goes on that Mr. Majid will be succeeded by other lecturers from all the chief dependencies of the British Crown. London ought to be, as Rome was in its day, the greatest centre in the world of jurisprudential learning. No other empire than the British can know so many different systems of law; in none perhaps have they so free a development. The jural principles evolved at Rome from the clash and conflict of different systems have remained to our own times the greatest and most abiding monument of the Roman genius. History in time to come may have a similar tale to tell of an expanded, all-embracing British jurisprudence, and to this I hope to-day's proceedings of our Society may make a material—perhaps memorable—contribution."

[1] An address delivered at a meeting of the Society held in Gray's Inn Hall in February last.

Mr. Majid then proceeded to deliver his address as follows :—

Wakf as Family Settlement.—The word "wakf" means, literally, detention or tying up. It is synonymous with the term "habs," which signifies detention or imprisonment. The Prophet is reported to have said,[1] "The wakf in its exact signification is equivalent to al-habs, that is, detention, as the people say, 'The beast stopped (*wakafat*) and I stopped (*wakaftoha*) her." Some Arabic scholars have translated it as imbolisation, appropriation or settlement.

In its legal aspect wakf has been regarded in two different ways. Abu Hanifa defines it as detention of ain, *i.e. corpus*, in the property of the wakif, *e.g.* dedicator or settlor, and the giving away of the use or the usufruct for the benefit of the poor or for some good object like things given by way of commodatum or loan.[2] On the other hand,[3] the two disciples, Abu Yusuf and Mohammed, hold that it is the detention of ain, *i.e. corpus*, in the employed property as that of God, the Almighty, in such a manner that the use or usufruct reverts to human beings, and that ownership is absolute and can neither be *sold* nor *given* nor *inherited*. This latter view is more approved than the former.[4]

There are two arguments which the two disciples advance. First, "When Omar was desirous of bestowing in charity the lands of Simag, the Prophet said to him, 'You must bestow the Actual Land Itself in order that it may not remain liable to be either *Sold* or *Bestowed* and that Inheritance may not hold in it.'" Secondly there is a necessity for the appropriation being absolute in order that the merit of it may result for ever to the appropriator; and this necessity is to be answered only by the appropriator relinquishing his right in what he appropriates, and dedicating it solely to God.[5]

To constitute a valid wakf no prescribed formula or word is necessary if it is clear from the general nature of the transaction that a dedication was intended. Thus it is laid down in the Fatawa Alamgiri[6] and has received recognition of the Privy Council[7] that "according to the Mohammedan law it is not necessary in order to constitute a wakf endowment to religious and charitable uses that the term 'wakf' be used in the grant if from the general nature of the grant such tenure can be inferred."

[1] Hedaya (original Arabic): "Al wakfo logatun howal habso yakoolo wakafat addabto wa awkatoha."

[2] Kafi (Arabic): "Habsul ain ala milkil wakife wattasuddug bil maufa-ate alal fokarae aw ala wajhin min wojoohil khair ba manzelatil awari."

[3] Hedaya (Arabic): "Inda hooma habsul ain ala hookme milkillah ta-a'la ala wajhin taoodo manfaatun elal abade falyalzam wa la ubao wa la yuhabo wa la uraso."

[4] *Yoyoon* and *yotimato* (Arabic both). Abu Yusuf was really very advanced in his legal conceptions. Germs of equity are frequently met with in his views. Perhaps the same reason which brought into existence the Roman equity acted upon his thoughts with like results. Therefore his views are generally approved.

[5] Hedaya (Hamilton), p. 232.

[6] See Fatawa Alamgiri.

[7] *Jewan Das Sahoo* v. *Kabeeruddin*, 3 Mac. Div. A.

Who can create a Wakf? —As a general rule any person who is capable of making a valid gift is entitled to create a settlement. He must be free as distinguished from a slave; and must be gifted with intelligence enough to understand the effect of his own action and the nature of the transaction. To guarantee the observance of the latter condition some care has been shown by the Moslem jurists by the addition of another specific condition. At the time of making the wakf the settlor must not be suffering from mortal disease,[1] that is to say, of which he dies subsequently to the creation of the wakf. Persons who are so suffering might be influenced by some people, or might have their intellect wholly or partly impaired, or might consent to it without properly realising the nature of the settlement. A settlement, therefore, made at such a period of one's life is wholly void unless assented to by all the heirs, if in favour of an heir, and is limited to one-third of the property subjected to the settlement, if made for the benefit of any pious or charitable purpose.[2] The settlor must have the power of disposition over the property and must not be a minor, as being legally incapable of transacting any business not materially beneficial to himself.

In this respect the jurists of all the schools are in entire agreement. "And of the wakif," says the Shiah Sharia, "it is required that he be of full age, of sound understanding and unrestricted in the use or disposition of his property." Following Badaia, the Fatawa Alamgiri lays down "among the conditions of wakf understanding and puberty on the part of the appropriator, as an appropriation by a boy or an insane person is not valid."

For the purposes of wakf "an insane person" is strictly interpreted. It corresponds to the *furiosus* of the Roman law or *non compos mentis* of the English law. Thus a person only of weak intellect is not wholly disqualified. The great authority of the Rud-ul-Mukhtar sets this question at rest: "If a person who is imbecile makes a wakf upon himself and after him upon some other purpose which does not fail, it is valid according to Abu Yusuf, but the latter will take effect only upon its being sanctioned by the judge."

A wakf by an insolvent person to defeat or delay his creditors is void.[3] This is clearly mentioned in the Fatawa Alamgiri on the authority of the Nahr-ul-Faiq. But this rule will be enforced only so far as there is no other property to discharge the debts to the extent of 20*s.* in the pound. The remainder will remain subject to the dedication. Following Bahr-i-Raiq, Rud-ul-Mukhtar lays down that this rule is applicable to the debts incurred prior to the settlement and that a dedicated property is free from any liability with respect to the debts incurred subsequent to the creation of the

[1] Fulton, p. 345. Fatawa Alamgiri.
[2] Fatawa Alamgiri, ii. p. 526.
[3] Fatawa Alamgiri (cf. bankruptcy laws in England).

wakf. *Prima facie* it may appear to clash with the two statutes passed in the reign of Queen Elizabeth, *i.e.* 13 Eliz. c. 5[1] and 27 Eliz. c. 4, the principles of which have been held to apply to India, but we must bear in mind that all wakfs are trusts for consideration and not voluntary, *i.e.* without consideration, and the party in whose favour they are made, that is, God, is not privy to fraud if there is any on the part of the settlor. The transaction being between the settlor and God, it was natural that the Moslem lawgiver and subsequent jurists took rather a wide view of consideration. A return in the next world, as mentioned by the Prophet, was held to be a good and valuable consideration by the Prophet, his successors and the jurists. Of this we shall see more in subsequent pages while discussing whether the meaning of wakf has been misunderstood in a way that really accounts for decisions contrary to the Mohammedan law, and that the word "wakf" properly meant "tying up," whether in the form of strict family settlement or in the form of religious dedications solely, or in the form partaking of both.

The power to create a wakf was not confined to the Moslems. Zimmis or non-Moslem fellow-subjects, indeed even enemies (*hostes*) within the territory by a special permission, were allowed to create wakfs with the same stipulations as Moslems. Indeed, this power was of such an extensive nature that one hears of the free choice of the non-Moslem settlor in the objects of wakf unrestricted by any law applicable to Moslems. Thus it is laid down in the Fatawa Alamgiri upon the authority of Fetah-ul-qadeer that "verily Islam is not a condition for creation of a valid wakf, so that if a Zimmi or non-Moslem fellow-subject were to create a wakf in favour of his son and descendants with an ultimate benefaction to the poor, it will be valid. It will also be lawful if he were to give it to the poor both Moslem and non-Moslem or if he were to specify the non-Moslem poor."[2] The observance of the conditions stated by the settlor was carried to its farthest extent. Such settlors could lay down that any of their descendants who should embrace the Moslem faith should be excluded. Although apostasy rendered a validly created wakf void, an apostate was perfectly at liberty to avail himself of the institution after his renunciation of the Moslem faith.[3] On the other hand, a wakf by a woman who reverted from Islam remained intact in spite of her apostasy.

These considerations lend colour to the theory to be discussed presently, that the institution of wakf formed a part of the customary law of Arabia prior to the time of Mohammed. Whether this was taken from the Roman law, in which perpetuity had reached a recognised place, is a matter of considerable doubt. Jurists hold that Mohammedan law was greatly influenced by the Roman law through the intercourse between the Arab merchants and the various law institutions existing

[1] *Abdul Hye* v. *Mir Mozaffar Hossan*, I.L.R. 10 Cal. 616.
[2] Fatawa Alamgiri; cf. Christian Converts Act (India).
[3] Bahr, Rad-ul-Mukhtar, vol. iii. p. 557.

on the coast surrounding the Roman lake, the present Mediterranean Sea. The analogy in many institutions is so startling that it makes a critical student ask himself whether it was really so in the light of the incontestable existence of a celebrated law school at Berytus, that is, Beyrout, down to the time of Justinian. Had it not been for considerations which militate against this theory I would have readily accepted it, and in face of those considerations one can but hesitatingly affirm that the Arabian law, in spite of its various similarities to the Roman law, was of independent growth and was no more influenced by the Roman law than the English common law shorn of all equitable doctrines.

The subject-matter of wakf must be certain. Any uncertainty which exists in respect of the thing or things meant, and which cannot be cleared up by attending circumstances, will have the effect of rendering the wakf void. Nor can a wakf be maintained if its creation or operation be subject to any contingency. The dedication must be free from any such conditions as would put the creation of wakf upon the uncertain happening of an event. It is dedication, and therefore must be unconditional as a gift.

The authorities are in entire agreement as to the creation of wakf of immovables, but there is some conflict of opinions among jurists as to the creation of wakf of movables, though the majority seem to be in favour of the view in the affirmative. I cannot do better than give a translation of the passage of a most authentic book, the Rad-ul-Mukhtar, as the authorities for and against are mentioned therein with great lucidity. "There is no divergence of view," says the Rad, "regarding the validity of wakf of horses or implements of warfare, nor of those movables and chattels which are constituted wakf by implication, when included in a wakf of land, as for example cattle. This is according to ahadis-e-mashhura, *i.e.* notorious traditions. With reference to the lawfulness of a wakf of other kinds of movables the views are conflicting. According to Abu Yusuf the wakf of movables is invalid, whereas Mohammed holds that a wakf of all articles which form the subject of barter, trade, or business is lawful. And this view has been adopted by the majority of jurists, as is mentioned in the Hedaya; and in the Asaaf it is mentioned to be the correct doctrine. In the Mujtaba also it is mentioned after the Siyar that, according to Mohammed, the wakf of movables is absolutely valid. According to Abu Yusuf, the wakf of such movables as form the subject of business transactions is lawful. In the Kholasa the views of Ansari have been adopted; Ansari was a disciple of Zuffer; and in Kazi Khan it is mentioned that Zuffer agrees with him. Sharhbelaliah also mentions that Zuffer has held so. In the Manah it is stated from the author that in our times the wakf of dirhems and dinars (money) is customary in the countries of Rum (Turkey), etc., and such wakf would come within the meaning of Mohammed's doctrine upon which rests the fatwa (general concord-

ance of the jurists) that the wakf of all movables which form the subject of transactions between people is valid. Consequently, it is not necessary to depend alone on the dicta of Imam Zuffer reported by Ansari for the validity of a wakf of dirhems and dinars (money). "Verily, the Moulana, the Saheb-i-Bahr (the author of the Bahr) has given a fatwa that the wakf of dirhems and dinars (money) is lawful and has not stated any contrary doctrine. And the opinion which is given in the Manah is the view of Ramli. . . . The wakf of a cow in order that its milk be distributed among travellers is lawful wherever it is customary. And Ansari was asked if the wakf of dirhems and such things as can be weighed and measured would be valid. He answered 'Yes.' On being questioned how that could be, his reply was, 'By turning it to account, *i.e.* investing, in the way of shirkut-i-muzaribut' [partnership in which one partner supplies capital and the other labour and skill]. And things which are capable of being weighed or measured will be sold and the proceeds invested in shirkut-i-muzaribut or commerce!"

The above leaves little doubt that a wakf not only of immovables, but also of movables of reasonably permanent nature is valid.

Perpetuity.—The next point I intend examining is whether perpetuity is the necessary condition of a valid wakf. "Eternity without end [perpetuity]," says the Fatawa Alamgiri, "is a condition [of wakf] according to the opinion of all [the jurists], but the express mention of this is not a condition [for a valid creation of a wakf] according to Abu Yusuf, and this is correct. This is on the authority of the Kafi."

The authority of the Rad-ul-Mukhtar also goes in the same direction. Concerning wakf, it says that it must be intended to be eternal (perpetual), but eternity (perpetuity) need not be mentioned. Wakf implies eternity (perpetuity), consequently if the wakif were to declare that a particular property of his was wakf for his children and say nothing further, it is valid, and after the children the income will be applied for the benefit of the poor, who never fail.

The Moslem jurists classify wakf into two divisions: first, public, for masalih-i-amma, that is to say, public works of charity or utility; secondly, private, for any other object besides the first. The latter may be subdivided into two classes—viz. wakf which partakes of both a public and a private character, partly devoted to public works and partly devoted to works of a private nature, and wakf exclusively devoted to objects of a private nature.

All these three kinds of wakf are amply supported by authentic books on Mohammedan law, and in practice by history and the writings of jurists all over the Mohammedan world. Little doubt is entertained by those who have tried to investigate the law [1] that wakfs of all three kinds are perfectly valid, existed, and were acted upon by the Prophet himself, his immediate

[1] Bailie, Morley, Kemp J., West J., Petheram C.J., etc., etc.

successors, associates, and Moslems of various Moslem countries at different periods of time.

As to the beneficiaries under a wakf, the greatest latitude is given to a settlor. He can create a wakf upon himself, a disposition upheld by the English Courts. "A wakf upon one's self," says the Rad-ul-Mukhtar, "amounts to a pious act." The Hedaya is also emphatic on this point:[1] "The design in appropriation is the performance of an act of piety, and piety is consistent with the circumstance of a person reserving the profits to his own use, as the Prophet has said, 'A man giving a subsistence to himself is giving alms.'" He can settle a property upon his children, generation after generation, but as a family is subject to becoming extinct in the natural order of things, the ultimate beneficiary would be the poor, who are always amongst us. If no mention of it is made in the deed, it will be so by necessary implication. In short, there is no limit to the objects in favour of which a wakf may be created provided the ultimate benefaction is to the poor, to satisfy the condition that a wakf must ultimately be in favour of an object of perpetual nature.

There are three effects of a valid wakf: first it renders the property subject to the wakf incapable of alienation;[2] second, the property cannot devolve save as mentioned in the deed; thirdly, the property becomes imprescriptible, that is to say, it is not subject to alienation, or to forfeiture by the sovereign as private property.

A few words on the point of alienation. The fact that a wakf property cannot be alienated means that it cannot privately be vended by the motawalli, *i.e.* the trustee or manager. But the property itself may not be withheld from free circulation provided it is done with the sanction of the judge, and the proceeds re-invested. It can be sold,[3] it can be exchanged with the authority of the kadi or judge. This exactly tallies with the powers vested in the Court of Chancery to deal with trust property, or powers given to the tenant for life according to the Settled Land Acts in the English law. The High Courts in India are Courts of equity, and therefore may exercise this power[4] either on the application of a motawalli, or through the mediation of the Advocate-General by allowing the motawalli or trustee to sellor exchange the property under a wakf so long as the purchase-money can be re-invested, thus causing a reintegration of the *corpus*. This formality of receiving a sanction is no doubt very wholesome, as otherwise a trustee might dissipate the property without being accountable to any one.

History.—The origin of wakf as family settlement dates back to the hoary antiquity of the time of Abraham. He purchased the cave of Machpelah in Kirjatharba about 1860 B.C., which remained in his family ever afterwards.

[1] Hamilton's Hedaya, tit. Wakf.

[2] See Tableau Général, also Sir R. West in the Journal of the Society of Comparative Legislation, vol. v.

[3] Kazi Khan; Fatawa Alamgiri, vol. ii. (original); Baillie, Pt. I. p. 587.

[4] See Charitable Endowments Act, 1890.

There is every likelihood that such an institution found favour among the people of Arabia and other adjoining countries. Mohammed, who always appreciated what he thought to be of any usefulness in anything Jewish or Christian, recognised it as a beneficial institution for the clannish Arabs. This has led some writers on Mohammedan law to trace the existence of wakf during and after Abraham's time.

But whether we are prepared to accept it as a fact or not, there is evidence to prove that wakf in the form of family settlement existed at least prior to the time of Mohammed, and was so embedded in the customary law of Arabia that it has continued to exist in full vigour down to the present time. It was thought to be such an essential part of the Moslem law that it was carried without modification to various countries which basked in the full effulgence of Islamic glory.

To enter into the details of the evidence the scope of this paper does not permit: we shall mainly relate three facts recorded in the most authentic books on Mohammedan law, which sufficiently support the view adopted. First, the creation of family settlement by way of wakf was not confined to the Moslems. It was open to a non-Moslem fellow-subject, nay, even to those enemies (*hostes*) who had sought refuge and were given the protection of the State. This fact suggests very strongly that it was a recognised institution among the pre-Islamic Arabs.

The great lawgiver recognised the usefulness of the system or perhaps found it such an integral part of the existing custom of universal force in Arabia that he felt chary of interfering with it. If it were purely Mohammedan there seems little reason in allowing the use of it to the non-Moslem fellow-subjects and to strangers.

Secondly, a mention of the fact in the Hedaya (Hamilton's, p. 232) and other books that it existed in pre-Islamic Arabia in the form in which it has found its way into Mohammedan law: "Shirrah says 'the Prophet determined the sale of a wakf property to be lawful,' which is as much to say that '*before* the promulgation of the law by the holy Mohammed appropriation was absolute,' but our law has rendered it otherwise." But the most authentic opinion is that it is absolute, which agrees with the submission that wakf existed in Arabia before Mohammed and that it was incorporated into the Mohammedan law as it then existed.

Thirdly, Prof. Nauphal traces the full legal recognition of wakf as family settlement from the time of Haroun-al-Rashid, as at that period many such settlements existed in Mecca. But the very existence of them at that time shows that the sentiment of the Arabs, as well as the actual tradition of the Prophet, supported them. They probably therefore formed part of the land laws of Arabia which existed in a more or less developed stage even before Mohammed.

So far with respect to the evidence of family settlement in early Arabia; let us next see how it was received by Mohammed himself and his successors.

It is mentioned in Bokhari[1] (Bombay edition, p. 384), the great and most authentic collection of the traditions of the Prophet, that a wakf upon one's children and relations is valid. The much-questioned tradition[2] that Omar the second Caliph actually created such a wakf with the sanction of Mohammed is also recorded there.

The institution of wakf as family settlement is mentioned in Fath-ul-Kadir. Imam Zailey corroborates and supports Fath-ul-Kadir. He also gives a copy of the deed of Arkam (a companion of the Prophet) by which he created the wakf of a house in favour of his children without any express reference to the poor at all.

The earliest collection of decisions contains those given by Imam Abu Yusuf, one of the greatest jurists of recognised authority, who was the chief kadi (chief judge) under the Caliph Haroun-al-Rashid. It is called the Fatawa Baramika. It is quite clear from it that a wakf was held lawful in favour of any lawful object, and would after its extinction go to the poor, who are supposed to be the ultimate beneficiaries of all benefactions.

The Fatawa Hawi, by Kadi Jamal Uddin Ahmed, who flourished about A.H. 600 and who was a celebrated cadi of Ghazni, also lays down that a wakf in favour of one's children—in short, in favour of any inoffensive object—is valid.

The great collection of fatawas which is contemporaneous in point of time is the Fatawa Kazi Khan. The author, Imam Fakhruddin Hassan Bin Mansur al uzjandi al-Farghani, flourished about A.H. 572 (A.D. 1195). As the book is of great authority and has been frequently referred to by the Sudder and Supreme Courts, it will be of advantage to quote the passage *in extenso*:

"Abu Yusuf [Cadi of Irak, who flourished after Mohammed; see Morley's *Digest*, Introduction, p. cclxv.] has laid down that when a man makes a wakf in these terms—this, my land, is a sadaka mawkoofa or mawkoofa and its produce will be for me so long as I live and after me for my children and children's children and their descendants in perpetuity as long as my posterity exists, and on their extinction for the poor—it is lawful."

The Zakirat-ul-Fatawa, a collection of precedents of the thirteenth century, emphatically supports the laws stated above. Nor does the Khazanah-al-Muftiin, a collection of precedents of the fourteenth century (about 1339), lay down the same law in less unequivocal terms. So does the Fath-ul-Kadir, a book of great authority, whose author, Kamaladdin Mohammed as Siwasi, flourished in Irak about the middle of the fifteenth century.

The same view is supported in Al-Issaaf, a book written by Bourhanuddin Ibrahim-al-Taraboulis (Tripoli), who drew his information from the writings of Abu Bakr al Khassaaf and Helal Ibne Yehya, celebrated

[1] Bokhari, 277, vol. ii., translated by W. Marcans, Directeur de la Medersa d'Alger.
[2] 22 I.A. *post.*

authors of great authority. This work was completed about A.D. 1488 (A.H. 905).

The Bakrur-Raek, compiled about 1562, lays down the same law. The Fatawa-Alamgiri, compiled in the reign of the great Mogul Emperor Aurung Zebe (1656), declares this to be sound law as practised in India. A book of undoubted authority, the Fatawa Durr-ul-Mukhtar, compiled about the same time; the Fatawa Rad-ul-Mukhtar, whose author is best known as Shami, compiled later on; the Fatawa-ul-Ankiravi of the same seventeenth century (1686); and the Majura-ul-Anwar, compiled in the eighteenth century, support the same view and leave absolutely no doubt as to the validity of wakf as family settlement if there be an ultimate benefaction to the poor.

There is another work which was brought out in 1841, towards the middle of the nineteenth century. That it is a book of great authority there is no doubt. Its author, Ibn Abedin, a lineal descendant of Mohammed, born in Damascus (Syria), has really brought out a revision of the collection of decisions given by Hamid Ibne Sulaiman, under whom Abu Hanifa studied law about a hundred odd years Hijra. It is called Al-Okood-al Durria-Fi-Tankih-il-Fatawa-il-Hamidia. This institution of wakf is expressly mentioned to be valid in favour of one's descendants with ultimate benefaction to the poor or any object of a permanent nature. It also leaves little doubt that it formed an integral part of Islamic law as early as A.H. 100 if not earlier.

As shown above, this ultimate dedication may be express or implied, and therefore a settlement without any mention of the poor will be valid. The statement of law above shows that for family settlements by way of wakf from the time of Mohammed down to the present time there is an unbroken chain of evidence to show that this law existed in Arabia, Central Asia, Persia, Afghanistan, and India, at periods when these countries successively came to share in the advantages of Mohammedan laws. The Turkish practice, a century ago, as described by D'Ohsson in his Tableau Général, was substantially the same. The Shafeite [1] and Shia [2] authorities (Persia chiefly) go to support the view of the jurists of the Hanafi school by being in full accord with them. The Mohammedan law under this head has been sufficiently dealt with in so far as the scope of this paper allows.

I now propose to quote four judgments of the Privy Council, two of which, it is submitted with great respect, are unacceptable because of not being in accord with Mohammedan law, however their soundness might, apart from this, be justified on the ground of public policy and equitable considerations.

The first case is *Jewan Das Sahoo* v. *Shah Kabiraddin* (2 M.I.A. 391). It is laid down in that case that according to Mohammedan law it is not necessary in order to constitute a valid wakf or endowment to religious and

[1] Minhaj, p. 187.

[2] Baillie ii. 226, Sharaya.

charitable uses that the term wakf be used in the grant, if from the general nature of the grant such tenure can be inferred.

The second case I beg to draw your attention to is *Ahsanullah Chowdhery* v. *Amarchand* (L.R. 17 I.A. 28). In that case their lordships of the Judicial Committee of the Privy Council had in view the judicial opinion of Justice Kemp in *Mazharul Haq* v. *Mahapattar* (13 W.R. 235, 1870), and their decision, although not in conformity with Mohammedan law in one essential, clearly recognises the point under consideration that a wakf by way of family settlement is not invalid. They purposely withhold their opinion on certain points which, if decided at that time, would have saved a great deal of discontent afterwards. It will not be out of place to quote the passage: "Their lordships do not attempt in this case to lay down any precise definition of what will constitute a valid wakf, or determine how far provisions for the grantor's family may be engrafted on such settlement without destroying its character as a charitable gift. They are not called upon by the facts of this case to decide whether a gift of property to charitable uses which is only to take effect after the failure of all the grantor's descendants is an illusory gift, a point on which there have been conflicting decisions in India. On the other hand their lordships think there is good ground for holding that provision for the family out of grantor's property may be consistent with the gift of it as wakf" (L.R. 17 I.A. 36, 37).

Then their lordships approve of the view taken by Kemp J. on family settlements (13 W.R. 235): "We are of opinion that the mere charge upon the profits of the estate of certain items which must in course of time necessarily cease being confined to one family, and which after they lapse will leave the whole property intact for the original purposes for which the endowment was made, does not render the endowment invalid under the Mohammedan law."

But they proceed to lay down a proposition which is hardly supported by the Mohammedan law, and perhaps the reason is, as their lordships expressly say, that the case was not properly argued. "On the other hand, they have not referred to nor can they find any authority showing, according to Mohammedan law, that a gift is good as a wakf unless there is a substantial dedication of the property to charitable uses at some period of time or other. . . . But no authority has been adduced for that proposition. . . . The observations of West J. are extra-judicial, as the case in which they were uttered did not raise the question.

This, it is submitted, is not Mohammedan law. So long as there is an ultimate benefaction to the poor, either express or implied, the wakf is good. It is not necessary that there should be an immediate benefaction to the poor: "at some period of time or other" might be construed to mean the proposition that if there be an ultimate benefaction to the poor, the wakf is good; but the actual decision in the case does not admit of this construction. It therefore leaves us where we were.

The next case is *Nizamuddan* v. *Abdul Gafur* (L.R. 19 I.A. 170). This case really adopts the correct view of Mohammedan law, and had it not been for an oversight of a principle, it would have put an end to any difficulty cropping up afterwards. Their lordships quote from the preceding case (19 I.A.) that "according to Mohammedan law there can be no valid wakfnama without a substantial dedication of property to religious or charitable uses at some time or other. In this case the so-called wakfnama makes no gift of the lands in question, either immediate or ultimate, for religious or charitable purposes. . . . It was plainly not his intention to create a series of life-rents, a kind of estate which does not appear to be known to Mohammedan law, but to make the fee devolve from one generation of his descendants to another without its being alienable by them or liable to be taken in execution for their debts."

This is good law *pro tanto* but for an oversight of a principle. It leaves out of account the principle that the ultimate benefaction in a case of wakf is *always* to the poor, whether it is expressed in the deed or not. This case at the very worst lays down the principle that such ultimate benefaction must be express. If it had been brought to the notice of their lordships that this element need not be express, that it is so by necessary implication, it is quite evident that judgment would have been otherwise.

The fourth and the last case is *Abulfata* v. *Rasmaya* (L.R. 22 I.A. 87). Their lordships really decided this case contrary to Mohammedan law and disregarded the authorities brought to their notice. Their lordships, it is suggested with great respect, never intended to decide the case according to Mohammedan law. Before I proceed to put my humble opinion in respect of this case I propose to quote the passages from the judgment as it materially affects the Mohammedan law:

> The opinion of the learned Mohammedan lawyer is founded, as their lordships understand it, upon texts of an abstract character and precedents very imperfectly stated. For instance he quotes a principle of the Prophet Mohammed himself to the effect that 'a pious offering to one's family to provide against their getting into want is more pious than giving alms to beggars. The most excellent of sadakah is that which a man bestows upon his family.' And by way of precedents he refers to the gift of a house in wakf or sadakah of which the revenues were to be received by the descendants of the donor Arkam. His other old authorities are of the same kind. As regards precedents, their lordships ought to know a great deal more in detail about them before judging whether they would be applicable at all. They hear of the bare gift and its maintenance, but nothing about the circumstances of the property—except in the case cited the house seems to have been regarded with special reverence—or of the family, or of the donor. As regards precepts, which are held up as the fundamental principles of Mohammedan law, their lordships are not forgetting how far law and religion are mixed up together in the Mohammedan communities, but they asked during the argument how it comes about that by general law of Islam, at least as known in India, simple gifts by a private person to remote unborn generations of descendants successions, that is, of inalienable life interests—are forbidden, and whether it is to be taken that

the very same dispositions, which are illegal when made by ordinary words of gift, become legal if only the settlor says that they are made as wakf, in the name of God, or for the sake of the poor. To those questions no answer was given or attempted, nor can their lordships see any. It is true that the donor's absolute interest in the property is curtailed and becomes a life-interest, that is to say, the wakfnama makes him take as motwalli or manager. But he is in that position for ever, he may spend the income at will, and no one is to call him to account. The amount of change in the position of the ownership is exactly in accordance with a design to create a perpetuity in the family, and indeed is necessary for the immediate accomplishment of such a design. It is suggested that the decision in *Ahsanullah Chowdhery's Case* (17 I.A.) displaced the Mohammedan law in favour of English law. Clearly Mohammedan law ought to govern a purely Mohammedan disposition of property. Their lordships have endeavoured, to the best of their ability, to ascertain and apply the Mohammedan law, as known and administered in India, but they cannot find that it is in accordance with the absolute, and as it seemed to them extravagant, application of certain precepts taken from the mouth of the Prophet. Those precepts might be excellent in their proper application. They might, for all their lordships knew, have had their effect in moulding the law and practice of wakf, as the learned judge said they have. But it would be doing wrong to the great lawgiver to suppose that he was thereby commending gifts for which the donor exercised no self-denial, in which he took back with one hand what he appeared to put away with the other, which were to form the centre of attraction for accumulations of income and further accessions of family property, which carefully protect so-called managers from being called to account, which seek to give to donors and their family the enjoyment of property, free from all liability to creditors, and which do not seek the benefit of others beyond the use of empty words.

First, their lordships consider the "texts" brought to their notice as of "an abstract character" and "precedents very imperfectly stated." In Roman law as in Mohammedan law the texts deal with the principles of the law. The repeated writings of jurists of various countries for nearly thirteen centuries leave little doubt that a uniform practice of creating family settlement (wakf) existed in various Moslem countries. Indeed, in India the compilation of the Fatawa Alamgiri, during the reign of Aurung Zebe, the Mogul emperor, is evidence enough that the practice was common there. To expect reports of cases as we have in England is too much. The art of printing was not known to them, nor were they fond of recording cases, which is peculiar to English law. It was enough for their guidance as valid if anything, as in this case of wakf, had received the sanction of the Prophet.

Even in England as late as 1300 the precedents were little used. Glanville cites one single case. Bracton (Henry III.) indeed does cite many cases, nearly 494, but it was peculiar to himself. Subsequent writers until about 1500 rarely quote cases. Lord Coke tells us that it was only about his own time that counsel quoted individual cases. The subsequent change was due probably to printing.[1] And after a course of

[1] See Pollock and Maitland, *History of the English Law.*

year-books, we come so late as 1756 before we have anything like continuous reports of what took place in the King's Bench Division, and even then many of the reports are very inaccurate. It was only in 1865 that a council of law reporting was organised which has ever since published the authorised reports revised by the judges.

In the light of the preceding, it is really too much to expect authorised reports of cases in Mohammedan law before printing came into vogue, if we are prepared to disregard the writings and practice of jurists of various Moslem countries. The precedents about the time of the Prophet are based upon such irresistible proof that we cannot ignore it, but at the very best it is a matter of historical interest. It is enough to sustain our contention to show that it did exist and does exist even to-day in various countries.

The second objection their lordships urge appears difficult to answer—that of inconsistency between ordinary gift and wakf if we leave out of account that the transaction is between God and man in one case, and between man and no one in the other. But this objection, apart from the answer given above, really leaves the law unaffected. Perhaps, as gift was peculiarly subject to misconception, it must be immediate and not at a remote period of time. There is another apparent inconsistency in the law of gift itself; still, it was never contended that such was not the law. Hiba is associated with hiba-bil-ewaz and hiba-ba-shartul-ewaz. Hiba means transfer of property for an indefinite return, while the two others mean for a definite return.

A glance at one of the great systems of law, Roman law, will show that such inconsistencies occur and really do not question the existence of such laws as such. Take for example usufruct (by will at least), which was created on condition precedent or to begin at a future time—*ex certo tempore* (D. 7. 1. 4, 34, 54, D. 7. 3. 1). It is said in the Digest that a usufruct may be granted to a man and his heirs (D. 7. 4. 5, etc.) and that his heirs took a distinct usufruct *licet diversi sint fructus* (D. 45. 1, 38, 12). John Voet questions this and relies upon a constitution of Justinian (C. 3. 35. 14): "a legacy is burdened with a usufruct in favour of the testator's heir; this usufruct shall come to an end at the death of the heir and not pass to heir's heir." Windschied considers it to be fair that it should be so in order that the legacy might have some effect, but contends that the constitution cannot be considered as prohibiting the devise of a usufruct to a man and his heirs. Windschied adds that though to allow a usufruct to go to heirs was in contradiction to the conception of a usufruct as a personal right, and to call the heir's interest a new usufruct was merely a formal reconcilement with the original doctrine, yet this step was a necessary consequence of the other personal servitudes, the emphyteusis and the superfices having become heritable.

Thus certain inconsistencies in law really cannot support a question of the existence of the law in face of overwhelming proof as to its existence.

It will indeed be in an ideal polity to have a system of law every part of which would be logically deducible from a few principles.

The third objection is that by this device the donor exercises no self-denial. It is apparent that he at least exercises a strict prudential control over himself by renouncing his right of alienation of the property subject to a wakf, besides giving it away to a cause of charity, though deferred.

The next point I should like to consider is the rule against perpetuities, which is responsible for the above decision. In India this rule as applied to wakf has been used in its primary sense [1] as meaning "indestructible, inalienable interest." This view, it is apparent from the preceding, disregards one element in the institution of wakf, that the property can be alienated provided it is sanctioned by the judge and the proceeds re-invested. Thus the ground that the property is taken away from free circulation, the basis of the rule, does not stand. Even if it were so, the economic condition of India, mainly an agricultural country, will require serious consideration before rules beneficial to a commercial country like England can be incorporated without any modification into the Indian law.

But, a step further. The rule itself. The first reasoned discussion of the rule appears in the *Duke of Norfolk's Case*,[2] in which Lord Chancellor Nottingham laid down that there was nothing unnatural or absurd in a "possibility upon possibility and a contingency upon contingency." But this case decides that a future interest might be limited to commence on any contingency which must occur within lives in being. Sixteen years after came the case *Lloyd* v. *Carew*,[3] which laid down the validity of a devise which was to take effect within a reasonable time after lives in being. But it was left for *Stephens* v. *Stephens* [4] to decide the validity of an executory devise to an unborn child of a living person when he should attain the age of twenty-one, and for *Cadell* v. *Palmer* [5] to finally lay down that the period of twenty-one years was to be in gross.

Thus it was not until 1833 (nineteenth century) that the rule against perpetuities took its present shape. Lord Brougham, who delivered the opinion in *Cadell* v. *Palmer*, made no secret of his dissatisfaction at the illogical process by which the decisions settling the rule as it exists at the present day was arrived at. Thus in *Phipps* v. *Akers* [6] he said: "The Courts and even this House have sanctioned what even plainly appeared to be erroneous principles, introduced and long assumed as law, rather than occasion the great inconvenience which must arise from correcting the common error, and recurring to more accurate views. Accordingly, when *Cadell* v. *Palmer* was argued in this House, I advised that your lordships should abide by the received extension, which has for a great length of time been given to the period within which an executory devise might be held good."

[1] Markby J., 12 W.R. 347.
[2] 3 Ch. Ca. 1 (1681).
[3] Shower 137 (1697).
[4] De G. & J. 62.
[5] Cl. & F. 372 (1833), Tudor's L.C. 424.
[6] 9 Cl. & F. 533, 598.

Again, in *Dungannon* v. *Smith*[1] he observed: "The rule of law is the term in gross of twenty-one years after the life or lives in being; that was clearly laid down by your lordships upon my recommendation. . . . I have a strong opinion, which I believe is joined in by the profession at large, that it arises out of an accidental circumstance, out of a confusion—I may say a misapprehension in confounding together the nature of the estate with the remedy at law by fine and recovery, which could not be applied till a certain life came to twenty-one years." Similar is his remark in *Cole* v. *Sewell*[2]; he says: "The rule that you can take a gross term most certainly arises from a mistake," etc., etc.

Such is the short history of the rule. It does not affect the ultimate reversion of a fee simple to the landlord, nor does it affect easement by custom, nor does it concern itself with contracts: one may validly promise to pay A or his heirs or administrators a sum of money at a future event which may not happen within twenty-one years after lives in being.

Again, if the rule is so beneficial as it is thought to be, it is rather inconsistent to allow charitable endowments to go out of its operation. The arguments with equal force apply to the latter. Moreover, *Christ's Hospital* v *Grainger*[3] and *In re Tyler*[4] make it quite possible that by laying down a condition that charity A was to enjoy a certain property so long as it paid a sum to the then living heir of the donor every year, and in case of failure the property to go to charity B, a perpetual provision could be made for one's descendants!

That the rule is by no means very just is shown by the experience of other highly developed systems of law. In Roman law the doctrine of *fidei commissa*[5] laughs to scorn the rule. So does the usufruct which passed generation after generation.

The Scotch law, again, had a most strict form of settlement on account of the express enactment of the Scotch Legislature in 1685. The "irritant and resolutive clauses" satisfied the most exalted views as to the extent of prospective control. The Act of 1848, c. 36, which allows the disentailing of a settlement, seems to have altered the law with respect to realty, while the Act of 1868, c. 84, allows only the creation of a life-interest in favour of a party living with respect to movables. The law of France does not recognise the rule in its entirety, and it is possible to make such an interest as would defy the rule in England within certain limits.[6]

Objections to the Rule as applied to India.—The introduction of the rule in India is open to grave objections. First,[7] the introduction of the

[1] 12 Cl. & F. 546, 629.
[2] 2 H. L. C. 186, 233 (1848).
[3] 16 Simon 83.
[4] 3 Ch. C.A. 252 (1891).
[5] Hunter's *Roman Law*; G. Bowyer's *Comment on the Modern Civil Law*, pp. 150-2.
[6] Code Civil, 896, 897, 1048.
[7] *Tagore* v. *Tagore*, per Sir Barnes Peacock, 4 B.L.R. 103.

principles of the English law into the Mohammedan law would create the greatest inconvenience. It would be a composite system wholly unknown to the Mohammedan law and would cause such uncertainty that no man would know what his rights are and no lawyer could safely advise him upon the subject. Religion and law are so mixed up among the Mohammedans that any such introduction of new principles would necessarily mean the incorporation of principles at variance with their religion.

Secondly, the rule against perpetuities in its English form owes its origin to pure accident, and a glance at its history will show that its development was neither logical nor harmonious. To adopt a rule so complicated and involving such logical inconsistencies is most undesirable.

Thirdly,[1] "the general principle of public law in British India is that of supporting the private customary law of each of the principal classes, except where it has been distinctly superseded by the statutory rule (Charter of Supreme Court of Bombay, s. 29, 41 Moo. I.A. 423). The law and the opinion of the Mohammedans undoubtedly regard a trust (wakf) such as the one in question as a charity, and granting this is a charity the objection to a perpetuity fails according to the principle of the English law."

The judgments embodied in the preceding pages are not in strict accordance with Mohammedan law, but they may perhaps be supported on the grounds of public policy[2] and equity.[3] In the event of legislation the wholesale adoption of all forms of wakf may not suit the present progressive time, and therefore to avoid the Scylla of infraction of the Mohammedan law and the Charybdis of fraud, etc., on the part of settlors, the suggestion of Sir Comer Petheram, K.C., late Chief Justice of Bengal—"to create an office dealing with wakf with ultimate real benefaction to the poor, put under the control of judges"—might prove very beneficial. The settlors should thereby be placed under the restriction to fully specify their intention to create the wakf to the judge, who after due investigations should formally sanction it. This will do away with any fraudulent intention on the part of settlors as well as express their real intention. As this in a great measure falls in with the view of Abu Hanifa as well as with practice in Egypt and Turkey, there can be no objection on the part of the Mohammedans.

The recognition of a limited kind of family settlement for the Mohammedans might solve the difficulty. They may be allowed to create family settlements, say, for a period of two or three generations, with power to the then existing motawalli to create another similar wakf if he so chooses, subject to a similar restriction. This in the main coincides with what Sir R. West (I am thankful to him for allowing me to mention his name) had

[1] *Fatima Bibi* v. *Advocate-General*, per Sir Raymond West, 6 Bom. 42.

[2] Blackstone.

suggested to Lord Northbrook on the subject. This reform will satisfy the Mohammedans as well as not go quite against the rule against perpetuities. We must remember that in the East the family forms the unit, while in the West the individual, and legislation, whether direct or indirect, should aim at the various states of things in different countries which it is meant to affect.

Sir Roland K. Wilson expressed a hope that the paper would be printed, as he had only been able to follow the reading of it very imperfectly, and it was evidently the result of extensive research. Addressing himself to the remarks of Mr. Ameer Ali, he expressed agreement with the criticisms passed by that learned writer in his books on the judgments of the Privy Council invalidating family settlements by way of wakf. He had been convinced by his arguments that such settlements were held valid by all schools at least as far back as the date of the Hedaya, and probably several centuries earlier, which was a sufficient reason for their being held valid by the British Courts administering Mohammedan law, though he did not think it proved, or likely, that Mohammed himself had had his attention directed to the practice and had given it his sanction. Still less could he agree with the lecturer that it was an institution of Pre-Islamic Arabia, seeing that it presupposed social conditions which did not then exist.

Where he differed from Mr. Ameer Ali was on the question of public policy. However erroneous, the rulings of the highest Court of Appeal must stand until reversed by legislation, which was the course advocated by that gentleman. He, on the contrary, considering the rulings in question to be sound from the point of view of public utility though wrong in law, would like to see the irregularity cured by confirmatory legislation—provided always that this could be done without seriously offending Mohammedan sentiment. Whether the general opinion of Indian Mohammedans (including the landless as well as the land-owners) was so strongly in favour of subjecting the living to the wishes or caprices of the dead that it could not be safely disregarded, could only be ascertained by a commission of inquiry and some system of vote-taking, and this was the course that he himself had advocated, in an article which appeared some time ago in *The Nineteenth Century*.

Sir R. West, in closing the proceedings, said: Mr. Majid well deserves the thanks of the Society, and all present will, I am sure, concur with me in acknowledging the valuable contribution he has made to our transactions in the paper he has read. The subject is one of some difficulty and one that has given rise to considerable differences of opinion even among Mohammedan jurists. It is hardly to be wondered at, therefore, if our Anglo-Indian Courts and the Supreme Court of the Privy Council, coming to the consideration of Mohammedan settlements in the form of wakf with a set of preconceptions

somewhat incongruous with Mussulman ideas, should have arrived at conclusions not quite acceptable to the general body of the believers in India. The difficulties of the case were not peculiar to our own Courts. There had been an almost equal clashing of principles and decisions under the French rule in Algeria, though the variances there were of a different kind, as they touched on the divergent doctrines of the Hanifite and Malekite schools of Islamic law and the patent inconsistency between the sacred inspired rule of family succession and the recognition or supposed recognition by Mohammed in practice of a system of dedication shading off into a law of entails or substitutions by which property could be tied up in mortmain for a long series of generations. The Arabian prophet found a system prevailing of strict agnatic succession. This he modified considerably and humanely in favour of females and cognates. The rules thus laid down by him had a divine sanction and admitted *prima facie* of no exception on grounds of mere human policy. But according to the traditions he approved in one or two instances a dedication during a founder's life of property such as to defeat the expectations of the heirs. He recognised too the principle of religious merit acquired by *sadakah* or gifts designed for that purpose, a view quite in harmony with that which suggested many Christian dedications in the earlier ages of our Church. Moreover, it was declared that no bounty could be more meritorious than that by which a benefactor's own descendants profited. Hence side by side with a rigid rule of inheritance a system of dedications and substitutions was evolved by the Moslem jurists—not without much controversy —by which, provided there were some clearly indicated ultimate bequest to the poor or the public, a series of successions might be constituted entirely superseding the ordinary descent in virtue of family connection. There is no abhorrence of a perpetuity, nor indeed in ordinary cases of any strict prescription under the Mohammedan law, but the conflict of principles as between wakf and inheritance could not escape attention; and the Mohammedan rulers, even those of the highest integrity, were embarrassed by finding a large proportion of the land placed *extra commercium* and exempted from fiscal contribution by the sacred impress of dedication. The unquestioned rule of inheritance was not opposed by any equally clear and complete pronouncement in favour of testamentary dedications or wakfs, and the conflict of doctrines which divided the schools of jurists made the subject one most appropriate for imperial and thence also for judicial determination. Thus our Privy Council might on purely Mohammedan principles have found their way to conclusions not widely different from those at which they have actually arrived. As matters stand it may, I think, be said that while the doctrine, broadly expressed, as to the unlawfulness of perpetuities is repugnant to Mohammedan ideas and sensibilities, yet a moderate law of entail limiting the right of disposition to two or three generations and not impairing the rights and capacities of the poor would be gladly accepted by our Moslem fellow-subjects as a reasonable compromise between tradition and

public policy. A practical enforcement of the law of interdiction and guardianship as against prodigals would be no less acceptable and would be quite conformable to the sacred law. A wakf duly constituted is regarded as a gift to God for the benefit of some class of His creatures. It takes immediate effect through the mutawalli's acceptance, and the beneficiaries may, according to Mohammedan principles, be preferably the descendant of the settler or wakif just as well as in England a first claim on certain endowment may be constituted in favour of a founder's kin.

SOCIOLOGY AND COMPARATIVE POLITICS.[1]

Difficulty of Defining Sociology.—Those of us who had the good fortune to hear the inaugural lectures of Professors Hobhouse and Westermarck on December 17 last will probably remember how wisely cautious both Professors were in the matter of offering definitions of Sociology. Professor Hobhouse indeed implied that Sociology is a science which has the whole social life of man as its sphere, and Professor Westermarck went so far as to say that Sociology might be regarded as the science of social phenomena; but I recollect very well that Professor Hobhouse suggested —at any rate as regards any more elaborate definition—that there might be at least as many definitions as there were sociologists in the room. Later, in the Editorial with which the first number of our *Sociological Review* opens, Professor Hobhouse gave us another compact formula. namely that Sociology is the science of society. The social life, he explained, constitutes a distinct field for investigation in the scientific spirit.

To such a terse formula as the science of social phenomena I take no exception. It is analogous to the definition of jurisprudence as the science of positive law. But though fully conscious of the difficulties and dangers of definitions—more especially of such as may be premature—I have found it necessary, for the purposes of the present paper, to attempt a somewhat more detailed definition—or, if you will, description—of Sociology. I have noted as very weighty the remarks of Professor L. Stein of the University of Berne, that "definitions do not anticipate sciences, but they succeed them," and that "what Sociology is in need of to-day is not a definition but a programme." It is, however, the main object of the present paper to suggest that the study of Comparative Politics should be admitted as part of the programme of this Society. It seems, therefore, inevitable that I should explain with, I hope, sufficient clearness what meaning I attach to the term Sociology; but I hope it will be understood that the definition I am about to suggest is devised for the purposes of this paper only and is, of course, open to continuous revision as the science of Sociology extends.

A Tentative Definition of Sociology Proposed.—Amongst the steps which I have taken to enable me to arrive at some conclusion which I could venture to lay before this Society was an examination of the three volumes

[1] An article contributed by Sir Lewis Tupper, K.C.I.E., C.S.I. to the *Journal of Sociology*, and reprinted here by the kind permission of the Council of the Sociological Society.

of our papers published for 1904, 1905, and 1906. I have found there a rather amusing confirmation of what Professor Hobhouse told us in his inaugural lecture about the great diversity of opinions entertained as to the meaning of Sociology. In these three volumes I marked no less than sixty-one passages containing either a definition of Sociology or a description of its aim. It is true that in a few of these cases a writer or speaker either repeats himself or expresses concurrence with some one else; but speaking generally there are different shades, at least, of meaning in every passage, and in many cases the views expressed are widely divergent and wholly irreconcileable. I have attempted to group them under various heads, but an account of this attempt is not really necessary for my present purpose. I will only say that the definition I would ask you to adopt—tentatively and for the matter in hand only—is derived, with certain differences, from one framed by Professor J. Arthur Thomson, of the University of Aberdeen, on the basis of the definition of biology. It is this: *Sociology is the scientific study of the origin, development, structure, functions, and decay of the ideas and institutions of mankind in successive stages of society.*

With the exception of those who may regard Sociology as the systematic elaboration of social and political ideals, I suppose almost every one would admit that this definition is sufficiently wide. It is, I think, consistent—except that it does not include the future as to which I shall have more to say below—with a description of Sociology given by Professor Hobhouse on the occasion of the able address by the late Dr. J. H. Bridges; and it seems to me quite in harmony with the official prospectus of this Society.

On several points it goes beyond the definition of Professor Thomson. *First*, I include *decay*—noticed in our official prospectus—which his definition omits. Not to speak of survivals—of customs or institutions which outlast their purposes or are applied to purposes for which they were not designed—the whole course of history is strewn with the wrecks of republics, kingdoms, and empires. Egypt, Babylon, Assyria, the kingdom of the Hebrews, Greece, great Rome herself, the empire of Charlemagne, the feudal and absolute monarchies of Western Europe, Mexico, Peru, the Delhi empire, the empire of Napoleon I.: with every one of these names is linked a fall or a decline and fall, a dissolution accomplished before our day, but leaving in every case some message, often a most pregnant one, for the students of the evolution of humanity. *Secondly*, I have added ideas to institutions, not merely because every institution has its subjective side, but mainly because the rudiments of social growth are first discernible in myth no less than in custom: in custom, because it is the mother of all institutions; in myth, because it is the wild imaginings and childish guesses and tales of primitive folk which later on are superseded by religion and philosophy. If we omit ideas we omit imagination, we omit religion and philosophy themselves, we close our doors to the theory of a dynamic

psychology of the race. *Thirdly*, I refer expressly to the successive stages of society, because the doctrine of evolution—I do not mean biological evolution in particular, but evolution in the widest sense of the term—seems to me to be the mainspring of Sociology, and we study the progress, and, as I have said, the decay, of phases of society in the hope that in the examination of their history the laws of their evolution will be disclosed.

The Meaning of Politics in this Paper.—After this somewhat elaborate explanation of a definition of Sociology it would be unconscionable to weary you with a definition of politics. I need hardly say that the politics of which I have to speak are not those of the daily press and the House of Commons. We have not to discuss the Licensing and Education Bills, the problem of unemployment, or old age pensions, or even matters of foreign policy—the Anglo-Russian agreement, the treatment of Macedonia, or the Congo State. I am far from saying that none of these matters have sociological aspects; the contrary is true of every one of them. As Professor Hobhouse, in his Editorial, reminded us, the muse of Sociology never ceases to murmur: "Homo sum, nihil humani alienum a me puto." But my concern to-night is with the politics not of the politician but of the philosopher. There was no passage in Professor Hobhouse's singularly able and fruitful Editorial that I read with greater satisfaction than that in which he said that our *Journal* will approach questions of living interest without party bias, and will endeavour to show that they can be approached in a scientific spirit. Were party to invade the discussions of this Society the first result would be that it would put science to flight. To what extent I may depart from the accepted signification of the term politics in political philosophy, or —if you will—political science, will sufficiently appear as I go on. Here I will only say that I agree with Professor Hobhouse in his remark made in the Editorial to which I have several times referred, that hitherto political philosophy closely resembles general philosophy in its method. The particular branch of politics with which I am now concerned—Comparative Politics—demands another method: the method of science. If we seek the guidance of Comparative Politics, we do not enter on the direct quest of any ideal; we do not aim at determining the ends of civil society; we do not assume states of nature which never existed except in the imagination of philosophers and of those who accepted for a gospel the superstitions which they were taught; we do not invent social contracts which never were and never could have been made. In this study ours is the humbler, but as I at least believe, more promising, task of investigating with laborious conscientiousness the actual facts of political evolution.

The Origin of Comparative Politics.—The origin of Comparative Politics, in one sense of the expression, is the same as the origin of Comparative Jurisprudence. In 1871, in the first of his lectures on *Village Communities in the East and West*, Maine observed: "The inquiry upon which we

are engaged can only be said to belong to Comparative Jurisprudence if the word 'Comparative' be used as it is used in such expressions as 'Comparative Philology' and 'Comparative Mythology.' We shall examine a number of parallel phenomena with the view of establishing, if possible, that some of them are related to one another in the order of historical succession. I think," he continued, "I may venture to affirm that the Comparative Method which has already been fruitful of such wonderful results is not distinguishable in some of its applications from the Historical Method. We take a number of contemporary facts, ideas, and customs" (note, please, that Maine includes ideas), "and we infer the past form of those facts, ideas, and customs not only from historical records of that past form, but from examples of it which have not yet died out of the world, and are still to be found in it." Two and a half years later Freeman, in his valuable book on Comparative Politics, referring as Maine had done to Comparative Philology and Comparative Mythology, noted the birth of a third science, the offspring, he asserted, of the two earlier sciences, which applied the Comparative Method directly to the growth of culture itself, the object of research being the nature and origin of the customs, the social institutions, the religious ceremonies of the different nations of the earth. This third science, he said, still lacked a name, and he added: "Let us hope that a name may be found for it, if not—which may be hopeless—within the stores of our own mother-tongue, yet at least within the range of the foreign words which have been already coined. It would be a pity if a line of inquiry which has brought to light so much, and from which so much more may be looked for, should end by cumbering the dictionary with some fresh word of new and barbarous formation." It appears from a note appended to the text that the barbarism of which he had so acute a fear was the now well-known and generally accepted term Sociology.

Freeman held that the establishment of the Comparative Method was the greatest achievement of his time, marking one of the great stages in the development of the human mind—a stage at least as great and memorable as the revival of Greek and Latin learning. He acknowledges his obligations to Max Müller, Maine, G. H. Waitz, and—very particularly—Mr. Tylor; but I cannot find in his Comparative Politics any trace of acquaintance with Comte, Darwin, Huxley, or Spencer. I agree with Freeman that there was an immense intellectual advance in the last half of last century—an advance which, in those subjects at least with which I am concerned as a member of this Society, I should say was without parallel. But I do not think that any one would now single out the discovery or use of the Comparative Method as the preponderating impetus in that advance. That Method has been a part only of a more general process traceable from an earlier date. The new light has spread somewhat gradually, so that in the early seventies there was many a man of eminence who had

not felt its glow. For my part, I would ascribe the dawn now perceptible in our mental sky—not indeed to the doctrine of evolution itself, for that was not new, but first to the vastly extended application of that doctrine under the stimulus of Darwinism, and secondly, to the application—advocated already by Comte in the thirties—of the methods of science to the interpretation of the social and political history of mankind.

Resemblance between the History and Methods of Comparative Politics and Comparative Jurisprudence.—It is not only in their origin that there is a resemblance between Comparative Politics and Comparative Jurisprudence. Many points of similarity are to be expected, because the field of Comparative Politics, though wide enough to include outlying regions of primitive customs where no state has yet been formed, and despotic states possessing, in the popular sense, no constitution, still, in what I may call its inmost ring, coincides with the field of constitutional law. In the term Comparative Politics I must distinguish three separate meanings, related to each other in historical order, and all significant for the purposes of Sociology. Each of these distinctions is equally applicable to Comparative Jurisprudence, and in that science also their historical order is the same. When we compare the political institutions of various nations, races, and times, what is the immediate object which we propose to ourselves, and, in order to attain that object, how do we limit the range of our inquiries? You will remember that Austin identifies Comparative Jurisprudence with general jurisprudence, which he contrasts with merely national bodies of law and practically limits to a philosophy dealing with the various legal principles common to the ample and mature systems of refined, that is, of highly civilised, communities. Similarly, Mr. Bryce says of one form of Comparative Jurisprudence that it has "a palpably practical aim. It sets out by ascertaining and examining the rules actually in force in modern civilised countries, and proceeds to show by what means these rules deal with problems substantially the same in those countries." A very large part of the work of the Society of Comparative Legislation has the same object—the comparison of the laws of civilised countries at the present time. Now Comparative Politics may be treated in precisely the same way. In sociological discussion we may call this method statical. It is statical as applied to modern civilised communities, though, of course, the statical method may be applied to any community or set of communities at any stage of development that may be selected. The application of this method in Comparative Politics to civilised communities may or may not be purely scientific. If it is purely scientific, it possesses some conspicuous advantages. The evidence which may be examined is extraordinarily abundant, a great deal of it is readily accessible; doubts can be cleared up by a communication with the living men who know. Modern civilised countries alone have reached what is as yet the last chapter in the natural history of mankind; and we may reasonably turn to them if we desire

light on the actual or probable contents of the preceding pages. Those communities which have passed through the greatest number of stages, including the latest stages, in the long journey from savagery through barbarism to civilisation, will assuredly still bear in their living frames many survivals of their past. Moreover, their records will be found to state the essential problem of Sociology, which is, How did the modern institutions of our time and civilisation come to be what they are? The examination of modern societies, with excursions, I admit, into historical research, has much scientific value; but it is most difficult to keep such an inquiry within the bounds of science. To say nothing of the bias which is almost inseparable from the estimate of any current facts, there is naturally a nearly irrepressible eagerness to seize upon the results of such an inquiry for philosophical, ethical, and practical purposes, and to make the immediate aim not the discovery of facts, their classification and causes and relation to evolutionary processes, but, by the elaboration of general theories, new or old, or even by direct imitation, to improve our own political institutions or those of our neighbours or those of the world at large.

The other two forms of Comparative Politics of which I wish to speak may both be described as dynamic, but one of them is primarily limited to the affiliation of institutions, while the other, though it does not neglect affiliation, has a far wider horizon, embracing not only political institutions which are derived by what I may call direct descent from rudiments common to the group, but all the political institutions of mankind, whatever their origin, whatever the course of their development. As in biology we may examine the growth of a particular species or on the examination of many species arrive at biological laws, so one dynamic form of Comparative Politics investigates the political institutions of a group of races, say the Greeks, the Romans, and the Teutons, while the other dynamic form, restricted in its operation only by the amount and character of the evidence available, searches alike in the historic and the prehistoric record and in the facts of modern life for indications of those laws of growth which, if we are right in holding that human society is no exception in the system of nature, must, with the advance of science, become more and more clearly discernible as the laws originating, transforming and completing throughout the ages the mass of political phenomena at large.

The Several Methods are not rigidly separated.—I have referred to these three forms of Comparative Politics, the statical limited to civilised communities, the first dynamic or affiliative form, and the second dynamic or purely evolutionary form, in order to remind you in a summary way of the contents and range of the science. But it would be inconsistent with past practice, and, much worse than that, a piece of useless pedantry, to insist on the rigid separation of these forms or methods in the practical work of investigation. Take, for instance, such a book as that of Professor John W. Burgess, of Columbia College, on Political Science and

Comparative Constitutional Law. On the whole, it is an illustration of the statical method limited in the way I have described. In treating Comparative Constitutional Law he selects the constitutions of Great Britain, the United States, Germany, and France, and limits himself to these, and includes in his reasons for this course that these are the most important States in the world and that their constitutions represent substantially all the species of constitutions which have as yet been developed. His aim is an ethical one—to lay down principles of public law; and—quite unscientifically, though not necessarily unphilosophically—he excludes the less perfect systems, disregards the less important States, and passes by those which, in his opinion, are not typical. Nevertheless, his examination of the several constitutions to which he confines his book is largely historical; and this, for the obvious reason that it is practically impossible to give an intelligible account of the present condition of such complex organisations as the constitutions of great countries without some reference to their past.

The well-known work of Bluntschli, *The Theory of the State*, marks the transition—in his case, I think, an unconscious transition—between the old political philosophy—very justly described by Professor Hobhouse as one of the roots of Sociology—and Comparative Politics in the scientific sense of the term. Bluntschli regards Political Science as the science of the conditions, nature, and development of the State. But what is the State? Comparative Politics, considered as a branch of Sociology, is concerned not with any ideal conception of the State, but with the political institutions of all times and races upon which the searchlight of modern inquiry can be brought to bear. Bluntschli says that General Political Science rests upon a universal conception of the State; but he adds, on the very next page, "Universal History shows us the different stages of development which mankind has lived through since its infancy; each stage has its own peculiar views of the State, its own political formation." True indeed; but if this is true, where is the universal conception of the State? The Comparative Method, he tells us, considers the most important states alongside of one another. He marks off the periods and races which are, in his opinion, significant—the Greeks and Romans in antiquity, the Teutons in the Middle Ages, the English, French, and Prussians in modern times—and then observes: "General Political Science has thus to do with the common political consciousness of civilised mankind at the present time, and the fundamental ideas and essentially common institutions which appear in various ways in different states." Evidently we have here a close analogy to —almost an identity with—Austin's conception of Comparative Jurisprudence. Later on Bluntschli strikes a deeper note. "The actual State," he affirms, "is that in which we live and work. Political Science has to do with that alone, and such a State is to be completely explained from a consideration of human nature." Comparative Politics as a branch of Sociology certainly is not limited to modern states; but one method—and an important one—of

verifying sociological conclusions is to prove their consistency with a true psychology.

Burgess and Bluntschli compared.—There is much in the writings of Burgess and Bluntschli which leads me to say that, consciously or unconsciously, they are Platonists. They seem to be in search of an ideal political system which has never yet existed on this earth, but which is discoverable, perhaps, *in nubibus* or *in gremio philosophorum.* They differ from Plato and submit to the influence of modern ideas in their method of search; they collate and compare all that seems best or seems inevitable in certain existing systems. I have pointed out that Burgess cannot dispense with history. The same is true of Bluntschli. When he comes to discuss the forms of the State he is naturally led on to indicate the general character of their development. He traces monarchy—not, it will be noted, in Africa or in the East—but in Homeric Greece and Ancient Rome, in the forests of the Germany of Tacitus, in the Roman Empire, in the Frankish and Feudal States, in the absolutisms of France and Spain and the threatened but averted absolutism of England, and in the rise and spread of its constitutional form over nearly the whole of Europe. He deals similarly with aristocracy—or, to be more accurate, nobility—in ancient and modern times, as also with democratic forms of the State. Generally it may be said that he presents a sketch of political development in Western civilisation; and to this part of his work at least Sociology may lay claim.

Freeman on Comparative Politics. His Method and Matter.—If Bluntschli is in transition, Freeman—so far as I am aware—was the first English writer to use the term Comparative Politics in a sense in which Sociology would desire to annex it. His immediate aim was strictly scientific. "For our present purpose," he said, "we must throw ourselves into a state of mind to which political constitutions seem as absolutely colourless as grammatical forms—a state of mind to which the change from monarchy to democracy or from democracy to monarchy seems as little a matter of moral praise or blame as the process by which the Latin language changed into the French, or the process by which the High German parted off from the Low. For the purposes then of the study of Comparative Politics, a political constitution is a specimen to be studied, classified, and labelled, as a building or an animal is studied, classified, and labelled by those to whom buildings or animals are objects of study." Of course, when we consider the great part often taken by conspicuous men in effecting changes of political institutions, it is impossible to eliminate moral factors; but here we leave the domain of science for that of history. For scientific as distinguished from historical inquiry the mental attitude described by Freeman appears to me to be correct. But he at once proceeds to limit the range of the Comparative Method in precisely the same way in which it was limited by Maine in his well-known controversy with the McLennans on the subject of the Patriarchal Theory. Freeman distinguishes likenesses between

any two political institutions as they may result from direct transmission—such as often occurs in the case of conquered provinces or of colonies—from simple imitation, from similar causes producing similar effects, or from derivation from a common source. It is with this last class of likenesses only that, according to his view, the study of Comparative Politics is concerned. He accepts the theory, taken mainly from the science of language, that the now parted nations once formed one nation; and holds that at the dispersion each band took with it not only a common tongue, a common mythology, a common store of the arts of life, but also certain principles and traditions of political life common to the whole family. These offshoots of a common stock, and these alone, are the object of Comparative Politics as he expounds the matter: likenesses not due to derivation from a common source he almost entirely disregards. He does not question—indeed he actually asserts—the strong probability that "much that is common to the various branches of the Aryan family comes from sources common to the Aryans along with other divisions of mankind." But he confines himself in the ancient world to Greeks and Romans, and in the ancient, mediæval, and modern worlds to Teutons, leaving wider inquiries to others, and contented to be sure of his footing on his own ground. He deals with the State itself, the head of the State, the King, and its body, the Assembly; and finds in Hellenic, Italian, and Teutonic antiquity alike the germs alike of the monarchic, the aristocratic, and the democratic principles of government. Everywhere he puts the tribe before civic or national institutions; he contrasts the Hellenic and Italian conception of the State as a city with the modern conception of a national State, and asserts broadly that "the Teutons passed from the tribal stage into the national stage without ever going through the city stage at all." He traces the idea of kingship from the Homeric king, Zeus-born and Zeus-nourished, down to the constitutional monarchies of modern times. He distinguishes between primary and representative assemblies, and in primary assemblies finds everywhere a general assembly of the people, a smaller council of hereditary nobles, of elders serving for life, or of magistrates or senators clothed with temporary authority. He recognises of course the comparatively modern device of representation, and contends that the functions of legislator, judge, juror, and witness, now so distinct, were originally intermingled, and that all grew out of the Assembly, which, being itself the people, exercised every kind of political power.

Value of the Affiliation of Institutions.—I do not think it is to be regretted that Freeman limited himself to the affiliation of institutions. At the time when he wrote, the idea of evolution had not been widely recognised as sweeping over a far greater range than the idea of derivation. Nor had the anthropological data then been collected and collated in their present abundance, enabling us to move in every direction far beyond the centre of Western civilisation, even although from that

civilisation light beams wherever else we may be led by the spirit of reason and inquiry. There is this great advantage in the study of Greek, Roman, and Teuton institutions, that we are at any rate on historical ground, and on ground thoroughly explored by generations of able scholars. The value under modern conditions of classical education is no part of my present theme; but even if we are to suppose that a mediæval system has now outlasted its original purposes, it is at all events a most important, and, sociologically, a most valuable result of its survival that the labours of scholars have kept alive, as part of our common intellectual heritage, a vivid and lasting memory of the only two civilisations which have ever existed that are really comparable with our own. It is as a starting-point that such a work as Freeman's helps us in Sociology. The affiliation of institutions traced by a competent scholar in one part of the world suggests numerous points for evolutionary inquiry, and its results based upon sound, if not all-embracing, historical investigation may serve as a standard with which to compare conclusions already suggested or to be suggested by the examination of further evidence.

Spencer and his Evolutionary Method.—Passing now from Freeman to Herbert Spencer, who, whatever view may be held of him as a metaphysician, was certainly a great apostle of evolution, we are no longer concerned with the fortunes of a part only of one great race in one continent: we are called to the survey of all races in all continents, indeed in all parts of the globe.

Both with Freeman and with Spencer we are in a climate of science. Spencer is as emphatic as Freeman in insisting on a scientific medium for our vision. In pursuing sociological inquiries into political institutions "we must," he says, "as much as possible, exclude whatever emotions the facts are calculated to excite, and attend solely to the interpretation of the facts." In this pursuit he is untrammelled by the limits of time or space or race voluntarily accepted by others whom I have mentioned. He does not confine himself to mature political systems; he does not deal with Aryan institutions either alone or primarily. A characteristic illustration of his method may be taken from his account of the militant type of society. He expounds certain conditions, manifestly *à priori*, which "have to be fulfilled by a society fitted for preserving itself in presence of antagonist societies." Then he goes on to say, "On inspecting sundry societies, past and present, large and small, which are, or have been, characterised in a high degree by militancy, we are shown, *à posteriori*, that amid the differences due to race, to circumstances, and to degrees of development, there are fundamental similarities of the kinds above inferred *à priori*." And in exemplification he instances modern Dahomey, Russia, ancient Peru, Egypt, Sparta, imperial Rome, imperial Germany, and—as he puts it—England itself "since its late aggressive activities."

I am afraid that Herbert Spencer, when on his favourite theme of the

contrast between industrial and military societies, does not always maintain that scientific detachment of mind which he regards as essential to the right interpretation of political phenomena. At any rate his description of the industrial type of society seems open to the criticisms that it is a description of a state of society which has never yet existed and appears unlikely to come into existence in the near future; and that it omits to note that predatory instincts are not destroyed by the discovery of new methods of depredation, and that gambling, and commercial speculation, nay, even certain forms of commerce itself, may be as ruthlessly callous to social and domestic misery as ever the military spirit was to mutilation and slaughter.

At the end of his discussion of political institutions Herbert Spencer goes even further, and abandoning science for guesswork asks, "through what phases political evolution is likely hereafter to pass." I mention his admiration for industrialism with its implication of the political doctrine of *laissez faire*, because it appears to me to disclose a bias which colours a great deal of his political philosophy. There are other difficulties, both general and special, in estimating the true value of that philosophy. A general difficulty is the deductive character of his system as a whole, supplemented though it be by inductive illustrations. The doubt frequently occurs whether induction has been carried far enough. The special difficulties are explained by Herbert Spencer himself. He was not able to spare more than two years for the investigation of political organisations generally. The task would need a lifetime, and he felt that his results would be imperfect. But he found himself compelled to deal with political evolution as part of the general theory of evolution; and hoped for justification from the stability of his leading conclusions after inevitable errors had been knocked away. He utilised, in addition to other materials, those gathered during fourteen years in the *Descriptive Sociology* compiled by his assistants; so that, besides other doubts, when we come across a seemingly dogmatic assertion with nothing better than *à priori* support, there is the uncertainty whether, after all, sufficient proof may not be buried somewhere or other in the ponderous tomes of the *Descriptive Sociology*.

His Leading Conclusions.—Apar from the theory on which I have already touched, that industrialism tends to supplant militarism, the leading conclusions are that primarily political development is a process of integration, and that as small, incoherent, social aggregates gain in mass, become integrated and pass from uniformity to multiformity, political organisation becomes more and more defined. The biological analogy, which Herbert Spencer presses so far in the portion of his work which he entitles "Introduction of Sociology," thus remains supreme, as indeed was necessary; for the transformation from homogeneity to heterogeneity, with certain accompanying consequences, is the dominant principle in the Spencerian philosophy.

Nowadays it might perhaps be said that it is superfluous to take trouble to prove such obvious facts as those of political integration and differentiation. The wandering bands supported by the chase, the shepherds and herdsmen moving over wide pastures, the tribes settled down in village communities to till the soil, the villages coalescing to form cities, and the tribes being gradually transformed into nations or states—the stuff that great empires or federations are made of—all this is matter of common knowledge; so too are the formation of castes and guilds, the classification of society into ruling houses, nobility, freemen, serfs or other dependants, and in ancient times, slaves, or later into royal families, nobles, citizens or the middle classes, and the people or the proletariat, the severance of legislative, judicial, and executive functions, and of the official bodies which exercise them. If some such description of political integration and differentiation were now to be regarded as almost too trite to need justification, it must be remembered that in making it I have only very partially followed Spencer, though I have, I believe, adhered to his leading conclusions; that in the past forty years the spread of Darwinism and the integration of Germany and Italy have strongly emphasised the biological analogy; and that Spencerian ideas, more or less amalgamated with other metal, have long been part of the current coin of periodical literature. Even if it be granted that political integration and differentiation were before Spencer's day already patent to some historical observers, Spencer deserves the credit of showing their connection with the general theory of evolution as he stated it.

An Illustration of Political Differentiation.—It is no part of my present intention to offer a criticism of Spencer's political philosophy; I have alluded to him merely in illustration of the evolutionary aspect of Comparative Politics. But I may perhaps be permitted to offer an illustration, not by way of criticism, but by way of confirmation of the view that specialisation of function is a concomitant of political progress. So far as I can recall a mental process which occurred now some thirty years ago, the extremely rapid severance between different government departments in India generally and more particularly in my own Province, the Punjab—a severance which I then took, as I take it now, to be covered by Spencer's formula—was one of the chief circumstances which induced me to say in a law-book which I wrote about that time, that "the doctrine of evolution has overstepped the domain of merely physical science, and has asserted its authority, not only in the realm of law, but in the whole territory of social existence." In the Punjab political differentiation has been quite strikingly exhibited. After the second Sikh war the government of the country was entrusted to a Board of Administration consisting of Henry Lawrence, John Lawrence, and Mr. Mansel. Lord Dalhousie's despatch constituting the Board declared that "every civil functionary from the Board to the *Kardar*"—the *Kardar* was the Sikh local official whose place has been taken by the *Tahsildar* or sub-collector—"will be vested with judicial, fiscal,

and magisterial powers." When I came to the Punjab in 1871, patriarchal rule was already on the wane, the Board had been severed into a Lieutenant-Governor, a Chief Court then of three, now of five judges, and a so-called Financial Commissioner who was really the Revenue minister for the Province. The District Officer was not so much of a king in his own district as he had been some years before; and he now sometimes complains that he is the servant not only of the Local Government, as no doubt he should be, but of some fifteen separate Government Departments. This multiplication of official functionaries is called the growth of departmentalism. Observe that I do not say whether it is a good thing or a bad thing; I merely note its consistency with the laws of political development.

I mentioned early in this paper that my main object this evening was to suggest that Comparative Politics should be admitted as part of the programme of our Society. I have put forward a tentative definition of Sociology—subject to amendment with the advance of the science—and I have described at some length the science of Comparative Politics, as I understand it, in its statical affiliation and evolutionary aspects. The tentative definition includes the scientific study of the institutions of mankind in successive stages of society. I hope that by putting the definition and the description together I may have succeeded in my aim, and may have convinced you that the scientific examination of political evolution on the basis of ascertained facts ought to be one of the objects of Sociology.

Limited Results obtainable in Comparative Politics.—I must, however, add the caution that we must avoid over-sanguine anticipations of the results to be obtained by the application of the Comparative Method in politics. We may indicate broadly successive stages of political growth —tribal, præ-feudal, feudal, monarchic, constitutional, democratic—but the process of evolution itself is not perfect, and we must not allow ourselves to suppose that every society has necessarily in the past gone through every stage which, on a generalised survey of political evolution as a whole, would be regarded as earlier than the stage in which we find it. More easily could we maintain the converse proposition that every mature society has, in its progress, at one time or another, overleapt some recognised stage.[1] But it is a great gain if we know for certain that particular stages are

[1] The passage in the text was suggested by the following excellent remarks of Sir Frederick Pollock and the late Professor F. W. Maitland. They are copied from Sir Frederick Pollock's Commentary on Maine's *Ancient Law*, pp. 22 and 178.

Sir Frederick Pollock writes: "We constantly speak of one rule or custom as belonging to a more advanced stage of ideas than another; but this does not mean that in every society where it is found it must have been preceded in fact by a less advanced institution belonging to the next lower grade of culture. Imitation of neighbours or conquerors, or peculiar local conditions, may materially shorten a given stage in the normal development or even cut it out altogether. What we do mean is that the order is not found reversed. Chalk is not everywhere in England, nor red sandstone; but where red sandstone is we know that chalk is not below it. Iron was known in Africa so early that Africa may be said not to have had a bronze age; but this does not make it more

earlier than others, and if we give that knowledge practical effect. With societies, as with individuals, mental progress—and therefore the progress of institutions corresponding to ideas—proceeds at extraordinarily different rates of speed. Not only do direct transmission and imitation transform normal growth, but like conditions leading to like functions are found at very different stages of culture. The conception, however, of a normal political growth, which must be carefully handled if the results are not to be noxious and dangerous, has a deep political importance in such an empire as ours, comprising, as it does, races in very various stages—perhaps in every stage—of political development. In proportion as we grasp and apply the principles to be gathered from Comparative Politics we shall be likely to avoid the perilous anachronism of imposing on the less advanced societies political institutions for which they are not prepared.

Ethical Import of Comparative Politics.—That is at least one ethical and political consequence which may follow from the study advocated; and there may be others. I have dwelt on the necessity of treating Comparative Politics in a purely scientific spirit, but I would guard against the possible misapprehension that the study, as I conceive of it, is without ethical import. As with the whole field of Sociology so also is it with this part of it. Scientific inquiry, as such, has no practical aim—it seeks truth and truth alone; but its practical results are enormous. Faith in Sociology means faith in scientific methods, and I have faith in the application of scientific methods to politics. Whatever we may discover to have been the tendencies of the past, whatever we may suppose to be the tendencies of the present, we are the lords and masters, not the slaves, of the laws of nature. To know them aright is to be able to command them; and it is here that we see the ethical import of scientific political inquiries. Your ideal may be monarchical, aristocratic, democratic, what you will, but science declares that you must measure your ideal against facts; and, for any practical and lasting realisations, must utilise the laws which it points out: unless indeed by ignoring those laws

credible that any tribe should ever have abandoned iron for bronze. In like manner there may have been tribes that had law-givers almost or quite as soon as they had judges. But no one has heard of a nation which, having acquired a body of legislation, reverted to customary law."

Professor Maitland said: "Even had our anthropologists at their command material that would justify them in prescribing a normal programme for the human race, and in decreeing that every independent portion of mankind must, if it is to move at all, move through one fated series of stages, which may be designated as Stage A, Stage B, Stage C, and so forth, we should still have to face the fact that the rapidly progressive groups have been just those which have not been independent, which have not worked out their own salvation, but have appropriated alien ideas, and have thus been enabled, for anything that we can tell, to leap from Stage A to Stage X without passing through any intermediate stages. Our Anglo-Saxon ancestors did not arrive at the alphabet, or at the Nicene Creed, by traversing a long series of stages; they leapt to the one and to the other."—*Domesday Book and Beyond*, p. 345.

you bring on greater mischief where you seek amelioration. In politics, as in our relations with physical nature, suffering is the penalty of ignorance.

We must admit, of course, that the moral and political world does not stand still. Unceasing change is one of the laws not merely of organic evolution but of the universe. The earth did not pause upon its axis or its course around the sun while Newton was identifying terrestrial and celestial mechanics. We cannot put off dealing with the evils of the day until we have before us the scientific conclusions of Sociology. The dangers of vicious systems of education, of poverty rebelling against its miseries, of class interests driven to fierce rivalry by the desire or possession of wealth, of crushing monopolies, of armaments designed for the slaughter of thousands of men in the prime of life by war between civilised countries—these must be faced with the time-worn weapons of *à priori* doctrines and empirical conclusions drawn from statistics and imperfect observations of current affairs; and also—not to overstate the case—from the consolidated experience of social and political necessities which is part of the social heritage of civilisation. But, granting that this experience, amassed but not yet fully organised, is, in some degree, a means of deliverance, is it too much to hope that at last, after groping our way with many stumblings through the blindness and the darkness of the ages, we may perceive, I will not say daylight, but the far-off glimmer of a dawn promising an eventual illumination to enable us to see, with some approach to certitude, what are the true lines of advance? And if these true lines can be ascertained, will it not be the duty of ourselves or of posterity to make them practically serviceable by the conversion and use of popular sentiment—the strongest force in the world, a force stronger than ironclads or repeating rifles or machine guns, because it is ultimately that force itself which forbids or commands, ratifies or reprobates, their use for destruction and massacre? I for one will not abandon the hope to which I have referred until it is conclusively demonstrated that Sociology is merely one more of the mind-begotten phantoms which have deluded philosophers and misled the crowd. Until that demonstration is forced upon me I shall continue to believe that the application of scientific methods to the interpretation of social and political facts will increase the strength of humanity in its unceasing contest with the giant evils which oppress mankind.

TRADE DOMICILE IN WAR.

[*Contributed by* T. Baty, Esq., D.C.L., LL.D.]

Domicile makes a Friend or a Subject an Enemy.—It has never been clear to us why modern writers introduce into the complicated subject of domicile the fresh complication which arises from the use of the term "commercial domicile." Prior to quite recent times a continuous catena of authorities—writers and judges—have asserted that the secondary criterion of enemy character in war time (enemy nationality being a primary and conclusive criterion), is domicile in the enemy country. They add that the carrying on of business in the enemy country will have the same result, *quoad* the business and the property connected with it.

Now, does "domicile" here mean anything but what it means when used in the sense in which we are familiar with it as the criterion of the personal law of an individual—namely, permanent residence in a given country? Dr. Westlake says that it does, agreeing therein with Phillimore, Foote, Wharton, and Dicey; but we are not quite sure from what he tells us what he conceives that its meaning really is. In *Private International Law* he seems to suggest that "enemy" domicile is nothing more nor less than the possession of a house of trade in the enemy country. Thus he quotes Lord Stowell's observation (in *The Jonge Classina*) that a "merchant may have mercantile concerns in two or more countries, and if he acts as a merchant of both, must be liable to be considered as a subject of both" *pro tanto*, as an authority to show that "enemy" domicile cannot be the same thing as private-law domicile (since that must always be single). So far, it would be concluded that Dr. Westlake identifies belligerent domicile with the carrying on of business in enemy territory. The two things are, however, so sharply distinguished in the authorities that this can hardly be his meaning. And in *International Law* (*War*) he shows that what he really appears to take to be the meaning of "enemy" domicile is not the mere carrying on of trade, but the carrying on of trade *without* the regular establishment of a house of business, by a person settled in the enemy's country in a manner continuous, but falling short of "private"-law domicile.

Is such a distinction tenable? In the first place, authors quote decisions on war-domicile and private-law domicile perfectly indiscriminately. No case is more commonly quoted to prove that "time is the grand ingredient in domicile" than *The Harmony* (2 C. Robins, 327). That was a simple

case of war-domicile; and if Professor Westlake and other modern authors are right, it has no application to the cases in which it has been continually cited. Halleck (i. 447, Sir Sherston Baker's ed.) quotes Admiralty cases freely (such as *The Diana*, *The Boedes Lust*, and *The Venus*) to establish propositions of civil domicile. *The Indian Chief* (3 C.R. 12), establishing that a domicile of choice is lost by putting oneself in motion to leave the adopted country, is universally quoted (though a war case) for that proposition.

At the date of *The Harmony*, Sir W. Scott seems to have not yet fully developed the theory of the consequences of having a house of trade in the enemy country. He limits his outlook to the common case of a merchant going abroad personally to reside permanently in a belligerent country, and he includes in it the case of his going there to trade. But by the time *The Portland* (3 C. R. 41) was decided, two months later, it was seen that this was not sufficient, and that a person who carried on a business in Amsterdam, though he seldom or never went there, was to all intents and purposes a Dutch trader, and must be treated as such. This does not in the least affect the wider principle of *The Harmony* already laid down. Trading, *without* enemy domicile, is sufficient: but that does not say that enemy domicile without trading is not.

Trade Residence: "House of Trade."—In the second place, war-domicile, if it meant (as Professor Westlake appears to regard it as meaning) the carrying on of business by a person having a certain settled residence in the hostile territory, would simply be a case of identification with the enemy through possession of a house of trade in the enemy country. It is not necessary that the trader should have a physical house of bricks and mortar, or a staff of clerks. Lord Stowell brings this out with great clearness in *The Jonge Classina*. "How much business is done," he remarks, "in coffee-houses!"

If, then, we are right in taking the fact of carrying on business in an enemy's country to be a cause of condemnation of property connected with that business, totally independent of domicile or even of residence, Professor Westlake's "war" domicile, as a kind of amalgam of trading and residence, falls by its own weight into that class of cases. It remains to be considered whether judges and writers of the past used the term "domicile" in this peculiar sense; or whether they did not mean simply that "private-law" domicile is a cause of condemnation of the domiciled person's goods. We cannot doubt that the latter was the opinion of Lord Stowell, of his American contemporaries, and of his critic, Wheaton. The full reasons which he gives for subjecting to capture the property of a person domiciled, in the ordinary sense, among enemies, are conclusive. The augmentation of the enemy's force by their being enabled to draw on his resources is the chief of these. It appears as no *ex post facto* justification of a rule adopted for quite different historical reasons (as Dr. Westlake asserts); but (as it was received by Lord Camden half a century earlier) as a simple matter of common sense.

Wheaton.—Wheaton carefully distinguishes the two concepts of domicile and possession of a house of trade. "In general, the national character of a person, as neutral or enemy, is determined by that of his domicile; but the property of a person may acquire a hostile character, independently of his national character derived from personal residence. Thus the property of a house of trade established in the enemy's country is considered liable to capture and condemnation as prize. . . . If a person enters into a house of trade in the enemy's country, or continues that connection during the war, he cannot protect himself by mere residence in a neutral country" (s. 334). What would have been the point of adverting to "mere" residence [*i.e.* domicile, without trade] in a neutral country, if such residence were entirely without bearing on the question of national character in war-time? In s. 335, he flatly contradicts, by anticipation, the modern thesis. "Residence [*i.e.* mere domicile] in a neutral country will not protect his share in a house established in the enemy's country, *though residence in the enemy's country will condemn his share in a house in a neutral country.*"

This would seem conclusive: but Professor Westlake has an answer. Obsessed by the notion (which, as has been remarked, is common to most modern writers [1]) that trading is inseparably connected with "war-domicile," he interprets this plain statement of Wheaton's by the following gloss: He restricts it to merchants; and then explains it by saying that of course the place where the merchant's gains are spent, as well as the place where his business is carried on, is benefited by his trade, and therefore, if belligerent, will involve him in its belligerent character. As if it made any difference to a man's spending capacity whether he made his money by trade or not! It is hardly conceivable how any one with Wheaton's neat statement in s. 334 before him—"In general, the national character of a person, as neutral or enemy, is determined by that of his domicile"—could yet interpret s. 335 after so restrictive a fashion. There is no possible reason for pressing Wheaton's mention of merchants to such emphatic lengths.

Still, it is something to have Dr. Westlake's admission that a merchant's domicile *sensu vulgari* is sufficient, wherever his house of trade may be. For most persons who have goods at sea are merchants. At the same time, the utility is not apparent of letting in by the back door what you have ostentatiously thrown out at the front.

Stowell.—We have cited Wheaton, and we may now quote Stowell and Story. In *The Vigilantia* (1 C. R. 1, at p. 13), Lord Stowell says distinctly, "where there is nothing particular or special in the conduct of the vessel itself, the national character is determined by the residence of the owner." This cannot mean his trading residence; for the judge is engaged in distinguishing his trade from his residence: it can only mean his permanent

[1] Dr. Pitt Cobbett, General Halleck, and Sir T. Twiss seem to be exceptions. The whole doctrine is unknown on the Continent.

residence or domicile. In the case in question, it was attempted to secure from confiscation a vessel engaged in a trade which was obviously Dutch, by representing her as the property of a person domiciled in Prussia. And the judge quoted decisions of the Lords of Appeal (*The Haasum and Ernst, The Jacobus Johannes*) to the effect that property of a person resident in Saint Eustatius was subject to condemnation "as the property of a domiciled Dutchman." Then he went on to say that the Lords had since expressly laid it down that "if a person entered into a house of trade in the enemy's country in time of war, or continued the connection during the war, *he should not protect himself by mere residence in a neutral country*." Why should residence in a neutral country be thought to protect him? What has his "mere" residence to do with the matter, if war-domicile is a matter of trade, and trade-residence only? His trade is assumed to be belligerent. Why should the Lords explain carefully that his private domicile will not save him? Clearly only because his private domicile is the normal criterion of his national character. Therefore, "That decision," proceeds Lord Stowell, "instructs me in this doctrine, a doctrine supported by strong principles of equity and propriety, that there is a traffic which stamps a national character on the individual, *independent of that character which mere personal residence may give him*."

Then mere personal residence *may* stamp a national character on him!

The Standard Criteria.—We cannot doubt that Wheaton correctly indicated the grounds of condemnation, as understood by the great judges who were his contemporaries, when he enunciated them as simply (1) domicile, (2) house of trade—in the enemy's country. The attempt to confuse the two heads by introducing a hypothetical "commercial domicile," is only productive of vagueness and misapprehension. Marshall, the United States Chief Justice, does indeed use the phrase. He uses it, however, in its only proper sense: that of a true domicile, established for commercial purposes, and accordingly subject (as a domicile established for reasons of health might be) to somewhat special considerations. Marshall points out that an American domiciled in France may readily be supposed to have quitted France for good, on the outbreak of war with the United States, if his residence there (though permanent) was taken up merely for purposes of trade. He never suggests that he might lose his French domicile for commercial purposes and retain it for private-law purposes. Marshall's logical mind would have revolted from such a position.

Marshall's Criterion.—The actual point was argued by Harper in *The Venus* (8 Cranch, at p. 267). "The residence which imparts a hostile character must be residence connected with some act of commerce blended with the commercial transactions of the enemy. Mere residence does not give a hostile character, so long as the resident refrains from all voluntary acts tending to the aid and comfort of the enemy.... Trading is essential: time is not." But

Washington, delivering the opinion of the majority of judges, after quoting the definition of domicile as given by Vattel, proceeds to declare that the English courts have adopted the doctrine that residence (*sc.* domicile) in an enemy country fixes an individual with the national character of the place, He repeats, with regard to this domicile, the common and ordinary rules which regulate private-law domicile. "If it sufficiently appear that the intention of removing was to make a permanent settlement, or for an indefinite time, the right of domicile is acquired by a residence even of a few days." And Marshall took no exception to this statement of the law, nor to the assumption that ordinary domicile is conclusive. He delivered a dissenting opinion, and would certainly not have omitted to take points of such cardinal importance if it had been possible. His cautious dissent is based only on this :—that it would be hard to refuse to recognise a *bonâ-fide* and prompt attempt to revert to his domicile of origin on the part of a person who has acquired, for merely commercial reasons, a domicile of choice in a country which becomes involved in hostilities with his own. It is possible, however, that his use of the convenient term "commercial domicile" may have been misunderstood; and that here we have the fountain-spring of the modern confusion. In the same way the case of *The Commercen* has been improved out of all recognition, by Continental writers who do not appreciate the principle that an Anglican case must be strictly interpreted by its own particular facts.

Story.—Story—the correspondent of Stowell, and the colleague of Marshall (whom he probably excelled in this particular branch of the law)—says (*Prize Courts*, ed. Pratt, p. 58) that the national character of the property "ordinarily depends upon the national domicile of the asserted proprietor . . . the general principle is that every person is to be considered as belonging to that country where he has his domicile." "If he has a house of trade in the neutral country, he has not the benefit of the same principle [as condemns a neutral resident's interest in a belligerent house]; for if his own *personal* residence be in the hostile country, his share in the property of the neutral house is liable to condemnation."

"It is a settled principle that traffic alone, independent of residence" —which is therefore assumed to be the primary consideration—"will in some cases confer a hostile character on the individual." So, in the same author's *Conflict of Laws*, ss. 47, 48, cases of prize-law are profusely cited as authorities, without one word of indication that there is anything improper or misleading in the process.[1]

Cases.—Probably the most clear and complete case in which the question has been raised in a court of justice is *The San José Indiano* (1814, 2 Gallison, 268). There, although it was not necessary so to decide, Story said in

[1] The editor, Bigelow, in deference to Westlake and Dicey, introduces a footnote to s. 41, distinguishing between civil and commercial domicile—to the probable confusion of readers.

terms—"As to the first point, it is very clear that, in general, the national character of a person is to be decided by that of his domicile: if that be neutral, he acquires the neutral character; if otherwise, he is affected with the enemy's character. But the property of a person may acquire a hostile character, altogether independent of his own peculiar character derived from residence. In other words, the origin of the property, or the traffic in which it is engaged, may stamp it with a hostile taint, although the owner may happen to be a neutral domiciled in a neutral country." He adverts to *The Jacobus Johannes* (1 C. R. 14), and again expressly recognises the distinction between personal residence and trading: explaining that, at the outbreak of war, (and then only,) can the neutral rely on his personal domicile to protect the property of his hostile business. From that case (*The Jacobus*) he observes, "the erroneous notion had been adopted that the domicile of the parties was that alone to which the court had a right to resort in prize cases." Clearly, he cannot here mean by "domicile," "trading residence"—for the claimant's trade was admittedly belligerent.

In *Elbers* v. *United Insurance Co.* (Johnson's S. C. Amer.) it was distinctly laid down that a Swede, being permanently resident in the United States, was wrong in insuring a vessel of his as Swedish property. He had taken little active part in business whilst in America, though his firm had agents there. The judgment proceeds avowedly on "the absence of all proof that [the insurer] was here temporarily, or that he intended to return at any future time to St. Bartholomew," as decisive of the fact that he had "an indefinite intention to remain here" (the ordinary criterion of civil domicile): "especially as he was actually engaged in superintending the business of his house" in the United States. The circumstance of trading is therefore looked upon as quite subordinate in importance.

It does not appear in *McConnell* v. *Hector* (3 B. & P. 113), that the debt on which the defendants (partners) relied was acquired by them in the course of the Dutch trade of some of them. They were refused redress simply because they were joint creditors some of whom resided in hostile Holland. The fact of their trading in Holland was referred to by Lord Alvanley, but not by the rest of the court: and even in Lord Alvanley's mouth the reference seems to be merely picturesque detail. He ends by saying simply, "While the Englishman resides in the hostile country, he is a subject of that country. . . ."

In *The Diana* (5 C. Robins, 63) there was no question of any house of trade. The property of Demerara people was condemned simply because they were established in Demerara.

It is indeed not always in the case of merchants that it becomes necessary to determine a person's national character. In *Sparenburgh* v. *Bannatyne* (1 B. & P. 161), an Oldenburger taken prisoner when serving on a Dutch frigate was held entitled to his Oldenburg neutral character when in England.

Dr. Westlake, who has so well shown us how "something called domicile" began to be recognised without much understanding in England towards the end of the 17th century as the criterion of the personal statute, certainly surprises us when he says (I. L. W., p. 143) that domicile was a familiar conception in Admiralty when the idea of nationality was still in embryo. Surely Elizabeth's judges—not to speak of Charles II.'s—had a pretty conclusive conception of what allegiance was, and would apply it to the determination of questions of belligerent right rather than their rudimentary notions of domicile! In point of fact, we know that it was on no subtle theoretic determination of national character by domicile as an always appropriate touchstone, that they proceeded. For the possession of a neutral domicile never saved an alien enemy's goods.

We conclude, therefore, that when writers and judges said "domicile" they meant "domicile"; and that if they had meant something different they would have taken the pains to distinguish their meaning. Dr. Lushington is largely responsible for the lace-like fabric of elaborate distinction which modern ingenuity has erected on the basis of a very plain and simple doctrine. There are two cases of his which we must examine before leaving the subject—*Hodgson* v. *De Beauchesne* and *The Baltica.*

Perhaps one of the earliest English cases in which the novel view which we are combating was propounded is the great cause of *Stanley* v. *Bernes* (1831, 3 H. Eccl., at p. 461). The King's Advocate and Serjeant Stephen say, "The cases from the Admiralty Reports [*The Harmony* and *The Ann*] merely apply to national character as relating to commercial purposes." The Court of Delegates, however, decided in favour of their opponents.

Lushington.—And no judge seems to have taken the same distinction until the case of *The Baltica.* It was decided in 1855, and was reported in Spink's *Prize Cases*, p. 264. Dr. Lushington speaks in his judgment of something which he calls a "mercantile national character"; and we have to consider what he means by it, and what its relation is to ordinary domicile on the one hand, and the possession of a house of trade on the other. First of all, he says that it "is governed by rules and authorities particularly applicable to it alone," and that it would only confuse the case to refer to other cases of domicile. But immediately after, he asserts that this remarkable "national mercantile character" is inheritable! Therefore it cannot be so very unlike ordinary civil domicile, and the confusion which the judge is so solicitous to avoid, returns immediately. It remains, inexpugnable, as we proceed: at p. 267 we find him saying, "With respect to a mercantile national character, the party becomes clothed with a new character from the period when he first takes steps *animo removendi* to abandon his former domicile, and *animo manendi* to acquire a new one." Why need he remove? If a "mercantile national character" may be double or quadruple, and is utterly unlike ordinary domicile, why need there be any question of removal or remaining?

It seems probable that all that Lushington really meant was simply what Marshall meant in *The Venus*. What they meant was that a merchant can change his domicile with some facility. He need not actually arrive in his new home: it is enough, in some circumstances, if he completes his arrangements for removal. In *The Baltica*, the merchant had in fact done all that was necessary to remove his whole establishment, and consequently his civil domicile, from England to Denmark. He had wound up his English business, taken an office in Altona, and convenient lodging for himself. His will would have been regarded as the will of a domiciled Dane. The only question was: Was he a Dane at any date before he reached Altona? And the enormous gulf between ordinary domicile and "mercantile national character" consisted in this at most, that an ordinary person would not have been held to be a domiciled Dane when he stepped on board the packet at the English seaport. Marshall's doctrine is, indeed, nothing more than the now well-established rule that arrival in the new country is unnecessary where that country is the domicile of origin. Lushington goes a little further, and allows a merchant in his character of cosmopolite to transmute his domicile, in the same summary way, to an entirely strange country.[1]

We now come to *Hodgson* v. *De Beauchesne*. This was a private-law case, turning on the capacity of a British general who had long been settled in France. Dr. Lushington, delivering the opinion of the Judicial Committee, quite gratuitously (for counsel—Drs. Phillimore and Addams—seem to have said nothing about it) observed:

"[Domicile during war] is, it is true, in one sense a domicile *jure gentium*, but in many particulars it is governed by very different considerations, and decisions belonging to it must be applied with great caution to questions of domicile independent of war."

Dr. Lushington, therefore, for the first time, so far as can be ascertained, judicially draws a distinction between the two conceptions of domicile. He does not draw a very marked and absolute distinction. The two things are, to him, very much alike. He asserts, however, the necessity of caution in arguing from one to the other. Dr. Westlake goes a long step further, and speaks of the "impropriety" of arguing from one to the other.

Phillimore.—We shall all be disposed to exercise "great caution" in these thorny matters. But a thing which calls for caution is not necessarily a thing to be reprobated as improper. We have seen that Story cites Admiralty Cases freely, as authorities on the Conflict of Law, and we may now add that Phillimore[2] actually cites as authority for his celebrated definition of domicile, the prize-law cases of *The Frances* (8 Cranch, 363) and *Johnson* v. *Sundry Articles* (3 Peters, 171). Although he urges that the facts which might establish a "commercial" domicile in time of war, might not serve to establish a testamentary domicile, yet it is to be noted that

[1] Note, however, that Denmark was the domicile of origin of the claimant's ancestors.

[2] *Law of Domicile*, p. 13.

he couples with "commercial," matrimonial domicile. That is now universally admitted to be precisely the same as testamentary domicile. And things which are equal to the same thing are equal to one another. Again he quotes *The Virginie* (5 C. R. 99) and *The Phœnix* (3 *Ibid.* 191) as general authorities on the conflict of laws, subject to the mere caution that "possibly" further evidence of the *animus manendi* might be required to fix a testamentary domicile in time of peace. It is to Phillimore's book on Domicile[1] that the doctrine suggested by Jenner and Stephen, and adumbrated by Lushington, is probably to be traced. Yet that eminent authority cites Admiralty and other cases, if not indiscriminately, at any rate with freedom.

House of Lords.—If any further authority were required, we need only cite *Udny* v. *Udny* (1869, 1 S. & D. Ap. 441), which is reported as having been regarded by the House of Lords as "involving questions of greatly more than ordinary importance." It received a most careful investigation at the hands of Hatherley, Chelmsford, Westbury, Colonsay, Selborne, and Mellish (the two latter *arguendo*). Both Lords Hatherley and Chelmsford quoted *The Indian Chief*, although a prize case, without hesitation; nor did Lord Westbury raise any objection. So in *Forbes* v. *Forbes* (1854, Kay, 341), *The Phœnix* and *The Dree Gebroeders* were cited in argument and judgment.

So *The Virginie* was cited in *Craigie* v. *Lewin* (1843, 3 Curt. 435) and in *A.-G.* v. *Kent* (1862, 1 H. & C. 12)—where also *The Harmony* was referred to by Pollock, C.B., as it was by Knight Bruce in *Munro* (1840, 7 C. & F. 862). See also *Maltass* v. *Maltass* (1844, 1 Robertson, 67), where *The Indian Chief* was referred to before Lushington, without rebuke.

We are now in a position to indicate our conclusions.

Conclusion.—In so far as the term "domicile" is used to denote the possession of a house of trade, with or without residence, prolonged or brief, it has nothing in common with private-law domicile, and has only been accidentally and improperly employed[2] to designate the state of affairs. But in its ordinary and proper sense it is, notwithstanding, a criterion of enemy (though not of neutral) character, whether the party be a trader or otherwise. And this ordinary and proper sense is its normal sense in prize matters as in others.

So that when Lindley, L.A., says that "The subject of a state at war with this country, who is carrying on business here or in a foreign neutral country, is not treated as an alien enemy; the validity of his contracts does not depend on . . . his real domicile, but on the place or places in which he carries on his business or businesses,"[3] we are led to express a respectful doubt. We venture to think that it is his real domicile which will be decisive, if the leading cases are not a maze of confused thought and more confused expression.

[1] *Law of Domicile*, p. 104.

[2] As by Kent (*Comm.* i., Lect. IV.

[3] *Janson* v. *Driefontein* [1902], A. C., at p. 505.

The only author who in recent years has firmly grasped the essential fact that commercial domicile is none other than civil domicile in a peculiar aspect is Twiss. Here, as so often, the strong good sense of that illustrious jurist supplies an invaluable beacon-light in navigating the sea of confusion.

"It has been sometimes said" (vol. ii. p. 306) "that there is a peculiarity about domicile in time of war, as distinguished from domicile in time of peace; and that as a person may have establishments in two countries for commercial purposes, he may have in time of war for commercial purposes both a neutral Domicile and a belligerent Domicile. . . . [But] an individual can only have one personal Domicile for international purposes, in the sense in which Domicile is a criterion of a person being a friend or an enemy, for no person can be at the same time both a friend and an enemy under the Law of Nations." He adds: "The more philosophical view would rather seem to be that which does not admit the Domicile of the owner to be conclusive of the immunity of his property . . . but only allows it to found a presumption of immunity, which may be rebutted . . ." *e.g.* by its being embarked in the enemy's trade. But in general, "all natural-born subjects of a belligerent power who may have abandoned their native country and acquired a domicile in a neutral country before hostilities have commenced, will have effectually clothed themselves with the character of neutral subjects; precisely as every natural-born subject of a neutral power will have clothed himself with the character of an enemy subject by long-continued residence, coupled with the intention of remaining, in the enemy's territory" (p. 300).

There we may leave the subject, the discussion of which has occupied us already too long, and has wearied our readers' patience.

THE STATUS OF NATIVE COURTS IN GOLD COAST COLONY.

THE following judgment, dealing with the question of the effect of the Gold Coast Order in Council, 1901, and the legal position of Native Chiefs and Native Courts, has kindly been communicated by His Honour the Chief Justice, by whom it was delivered on December 9, 1907.

Mutchi v. *Kobina Annan, Kobina Inketsia.*
Mutchi v. *Kudu.*

JUDGMENT.

In these cases, which were consolidated by consent, the plaintiff claims to recover damages from the defendants for trespass on the land Nkraisiam. After the close of the cases the defendant was allowed to put in the notes of evidence of a case heard a year ago between plaintiff and the defendant Kobina Annan, in which the same plaintiff had sought to eject Kobina Annan from the same land, and counsel for the defendant was about to argue that the proper remedy for plaintiff was ejectment and not trespass, but I pointed out that the question which had been fought out was the ownership of the land, and that was the real issue before the Court. The argument was not pressed; had it been, I should have allowed any necessary amendments. Although counsel for the parties in the first action agreed that there was no dispute as to the identity or boundaries of the land, except as to its name, it is clear that the land Nkraisiam does not bear the same meaning for the plaintiffs as the land Bessim bears for the defendants. A plan was made, apparently at the suggestion of the Court, but the surveyor was not properly instructed as to what points his attention should be specially directed to. Unfortunately, too, the surveyor was engaged by the plaintiff without reference to the defendants, with the result that defendants did not show their boundaries, farms, villages, or other objects evidencing title. Consequently the value of the survey is to a large extent nullified. It is clear, however, that both plaintiff and defendants claim at least the land which I have shaded blue on the plan put in evidence; how much more each side claims I cannot say.

The defendants' case is strong. It is not only that they are actually in possession of this land through the defendant Kobina Annan, but that Kobina Annan and his people are the only persons who have ever been in possession. Of course they add that it was originally allotted to the ancestor of Kobina Annan at the first distribution of the Kommenda lands, but that contention is of no real value, as I do not for a moment believe that originally the extent of lands allotted was defined except in the vaguest terms. The plaintiff's ancestor would

have been given or would have selected Resiase, Kobina Annan's ancestor would have been given or would have selected Kwahin Krom, the boundary would have been between them, and the question of boundary would never have been mooted until their respective subjects came into touch. I therefore pay no heed to the statements of either side as to their original allotments. The defendants' case is, therefore, present occupation and original possession. The plaintiff's case is that his predecessor Kweku Duro, who must have died sixty or seventy years ago, permitted Kobina Annan's predecessor, Kofi Mensa, to work on this land; that Duro's and Mensa's people worked amicably side by side from year to year without friction, it being recognised that the land in question belonged to Duro; that this state of things continued up to four or five years ago, until the death of Kobina Annan's immediate predecessor and the death of Kwesi Kuntor, the plaintiff's immediate predecessor; that about four or five years ago Esampon, the son of Kwesi Kuntor, had a dispute with respect to a part of this same land with the defendant Inketsia, cousin of Kobina Annan, and brought the matter before Kwesi Kuntor; that both Esampon and Inketsia went before Kwesi Kuntor, who pointed out to them that it was he who had permitted Inketsia to work there, and therefore they must work in peace; that Inketsia acknowledged Kwesi Kuntor's right to the land; that on Kwesi Kuntor's death the plaintiff sent for Inketsia to ask him why he had not sent palm-wine to him; and that Inketsia in no way disavowed plaintiff's right but only made excuses, viz. that he had had guinea-worm and could not walk much; that subsequently Kobina Annan brought an action against the plaintiff in the Court of Essandor, Omanhene of Kommenda, with respect to the land, and that judgment went in favour of the plaintiff; that there was another case between the plaintiff and the defendent Kudu, in which Kobina Annan gave evidence, and here again judgment was given for the plaintiff. The plaintiff also called witnesses to show that they had worked on the land. The plaintiff also called Kobina Adjapon to prove that Kobina Annan sent a message asking him (Kobina Edjapon) to give evidence in his favour in the case before the Omanhene. It was also alleged by plaintiff that the two parties had lived quietly together for years on the mutual understanding that Duro had permitted Kofi Mensa's people to live there, and that it was only upon Kobina Annan's succession that he repudiated the plaintiff's title.

Some of the plaintiff's evidence I accept. I have no doubt that his story about Inketsia is generally true, and I disbelieve Inketsia's denials. I also believe that Kobina Annan sent to ask Edjapon to be a witness on his side, and there is no doubt that plaintiff has recovered judgment both against Kobina Annan and Kudu with respect to some portion of this land. What I believe happened with respect to these matters is as follows: Esampon and Inketsia got into touch on the confines of the land shaded blue, and the matter went before Kwesi Kuntor, who probably said that Inketsia should be allowed to cut palm-trees there, Kuntor expecting to get some of the palm-wine from the trees cut. Soon afterwards Kwesi Kuntor died, and then the plaintiff definitely called upon Inketsia to bring in some of the palm-wine he had made. Inketsia fenced. The matter was brought to the notice of Kobina Annan, who, in consequence of plaintiff's claim upon Inketsia, sued the plaintiff before Essandor with respect to the land Bessim, which was probably only a small portion of the land shaded blue, a portion to the extreme north. Kobina Annan approached Edjapon, who had a farm near the boundary, with a view to securing his evidence. The case went before Essandor, who gave judgment for the present plaintiff. This was subsequent to January 1, 1902. Another case followed between the plaintiff and

the defendant Kudu in which Kobina Annan again put forward his claim to the land; here again the plaintiff was successful.

On the one side, therefore, I have the present and past occupation of the land in question; on the other side is Inketsia's apparent admission with respect to some outlying portion of the land in question and the judgment of a Native Court, subsequent to January 1, 1902. Now this, so far as the case of *Mutchi* v. *Kobina Annan and Kobina Inketsia* is concerned, is one of those rare cases in which it is possible to say definitely what was the issue before a Native Court. The issue before Omanhene Essandor was exactly the same as the one now before this Court. Kobina Annan was the plaintiff and claimed the land which he called Bessim, Mutchi was the defendant and he claimed the same land under the name of Nkraisiam. Bessim is, I am satisfied, a portion of the land shaded blue in the plan; it is not the whole land north of Kwahim Krom, as some of Kobina Annan's witnesses would have us believe, but only the northern part of the blue-shaded land, and it probably derives its name from some recognisable natural feature. It is the portion marked in the plan "Site of the Trespass," and is the very place where the trespasses alleged in the writs of summons took place.

The case comes exactly within *Amocoo* v. *Duker*, decided in 1883, and reported in Mr. Sarbah's *Fanti Law Report*, p. 35. In that case the plaintiff and defendant were subjects of the Omanhene of Anamabo, they had a dispute over some land and went before their Omanhene, who settled the dispute in favour of the defendant; the plaintiff was not satisfied with the decision of the Omanhene and sued the defendant on the same cause of action before the Divisional Court at Cape Coast. Mr. Justice Macleod, on proof of these facts by the plaintiff and following previous decisions, gave judgment for the defendant on the ground that the Court could not go behind the judgment of the Omanhene. But the learned judge was not satisfied with the trend of the decisions upon the subject and gave judgment for the defendant subject to the opinion of the Full Court, and he submitted to the Full Court the following question: "Does a decision given by a native king or chief between parties who voluntarily appear before him to have a matter in dispute between them settled, preclude the Courts of this Colony from the consideration and determination of the issues of fact and law involved therein?" The Full Court held that if the plaintiff did voluntarily appear and submit (to the arbitration) of the Native Court the judgment of the Court below should stand.

A perusal of the judgment of the Full Court shows that although there was only one judgment, the two judges composing the Court took different views. Mr. Justice Macleod states in the judgment that the decisions of native chiefs have been compared to the awards of arbitrators, but that to his mind that is a most misleading comparison; his view was that the tribunal was a Court, that parties were summoned before it, that it was not an arbitration, and that the Courts of this Colony should not be precluded in such a case from going into the issues of fact and law. Chief Justice Bailey dissented from that view. What his view was is not altogether clear; he refers to the "arbitration of the Native Court . . . by which the case was heard and judgment given," but implies that the native judgment is to be regarded merely as the award of arbitrators. We have, therefore, one judge taking the view that it was not an arbitration, and the other, the presiding judge, taking the view that it was an "arbitration" of a "Native Court." Did that judgment stand by itself there could be no question that it would apply directly to the case of *Mutchi* v. *Kobina Annan and Kobina Inketsia*. But it is impossible to say what effect the presiding judge gave to

the fact that the tribunal which gave the decision was a Native Court, a Court which in *Oppon* v. *Ackinnie* (Sarbah's *Fanti Customary Law*, p. 232), the Full Court in 1887 decided was alive and possessed of jurisdiction. These two cases taken together decide that the decision of an Omanhene and his Councillors is not arbitration, but the judgment of the Native Court, but that our Courts will only give effect to the judgment of such a Court if the parties go before it voluntarily. It is to be carefully noted that the two essentials are voluntary submission and a Native Court.

In 1901 followed the Order in Council annexing the Protected Territories, and it is a much-disputed question whether the effect of that Order in Council is not to destroy all Native Courts not under the Native Jurisdiction Ordinance 1883. If such Courts have been destroyed, it seems doubtful whether *Amocoo* v. *Duker* is still binding on this Court, for neither Omanhene Essandor nor Omanhene Ackinnie nor the Omanhene of Anamabo were under the Native Jurisdiction Ordinance. If such Courts have not been abolished, then *Amocoo* v. *Duker* is still binding on this Court. It will, therefore, be necessary to discuss this vexed question, and to consider the effect of the two Orders in Council of September 1901 upon the Native Courts not under the Native Jurisdiction Ordinance.

This question was first raised by Mr. Justice Morgan in the cases of *Bainyi* v. *Dantsi* and *Bainyi* v. *Appiah*, when the Full Court was equally divided on the question, Morgan and Purcell JJ. being of opinion that the Order in Council annexing the Protected Territories abolished Native Courts not under the Native Jurisdiction Ordinance, 1883, whilst Griffith C.J. and Smith J. took a contrary view. The question was again raised in the case of *Ghambra* v. *Num*, where Pennington J. took the view of Morgan and Purcell JJ. and stated as follows:

> To give them (the Native Tribunals) authority as such since September 26, 1901, they must be duly and specifically constituted. The Crown may establish Courts to proceed according to common law, yet it cannot create any new Court to administer any new law; the erection of a new Court with a new jurisdiction cannot be without an Act of Parliament. When a country is annexed the laws remain, the Courts never do. For these reasons I am convinced that Native Courts unless established by the legislature or by the King in Council have ceased since September 26, 1901, to be Courts of competent jurisdiction.

Of course, the learned judge in referring to an Act of Parliament merely means "by statute" which would include an Ordinance, and to avoid misunderstanding I would point out that the Orders in Council of September 1901 did not come into force in the Colony until January 1, 1902.

On the question of law I am generally in agreement with my learned brothers that the Crown is the sole fount of justice, but I think that the facts show that His Majesty has, in the Imperial Orders in Council, recognised these Courts and consented to their continuance. Blackstone says (Book III. chap. iii.), that "all Courts of Justice are derived from the power of the Crown. For whether created by Act of Parliament or Letters Patent or subsisting by prescription (the only methods by which any Court of judicature can exist), the King's consent in the two former is expressly, and in the latter impliedly, given." It will not be disputed that in the case of a Crown Colony the consent may also be given by Order in Council. And if it may be so given, it is immaterial whether it is given expressly or impliedly. All that is necessary to ascertain is whether the King has given his consent to the continuance of these Courts. If he has given his consent they continue, if he has not given his consent they have ceased to

exist. If I can show that he has done so, either expressly or impliedly, I submit that they do continue and have not ceased to exist. It is to be remembered that the question is not whether His Majesty has created these Courts. That, I assume, would have to be effected under the British Settlements Act, 1887. These Courts have been in existence from time immemorial up to the date of the annexation, they cannot continue to exist within His Majesty's dominions without his consent, and the only question is whether he, in his kingly office, has consented to their continuance. I assert the broad principle that the Crown may, in annexing a territory, consent to the continuance of the ancient Courts of that territory, and that if such consent be shown, such Courts continue.

Before dealing with the question of Native Courts not under the Native Jurisdiction Ordinance 1883, I will draw attention to the position of Native Courts which had been brought under that Ordinance prior to the coming into force of the Annexation Order in Council. It must be borne in mind that the Native Courts which have been brought under this Ordinance are not King's Courts. They are native common law Courts existing from time immemorial; their judges are not appointed by the King or by his representatives; their Court fees and fines go not to the colonial revenue, but to the chiefs and councillors; their prisons are managed by themselves; and their process does not issue in the King's name, but in the name of their respective chiefs. The Native Jurisdiction Ordinance merely regulates those of the Courts to which it applies; it does not abolish and re-establish them, but, taking them as they stand with their customary constitution and customary procedure, it merely cuts down some of the unlimited civil jurisdiction which they possessed, confers upon them certain criminal jurisdiction and provides for their further regulation; but the Courts remain the native common law Courts, and are not the King's Courts. So far it has not been disputed that they exist and retain their powers, although within the British dominions. The reason that they do so exist is because they have been recognised by the Sovereign, not because they are King's Courts; their survival within the British dominions is due only to implied recognition by the Crown. In neither of the two Orders in Council is there any express reference to these Courts: there is only implied recognition, and their continued existence is due to this implied recognition. And before getting to the facts I would lay stress not only on the great difference between conquest and peaceful annexation, but also upon the peculiar circumstances, described in my judgment in *Bainyi* v. *Dantsi*, of the annexation of the Protected Territories of the Gold Coast. In the late case of the *West Rand Mines* v. *The King*, in the *Times* of June 2, 1905, the Lord Chief Justice referred to the difference between cession after conquest and peaceful cession. The question there was whether the British Government took over the liabilities of the late Transvaal Government. In his judgment the Lord Chief Justice said as follows: "References were made to many cases of cession of territory not produced by conquest, and the frequent assumption in such cases of the liabilities of the territory ceded by the State accepting the cession was referred to. They may be dismissed in a sentence. The considerations which apply to peaceful cession raise such different questions from those which apply to conquest that it would answer no useful purpose to discuss them in detail." The same principles apply in the case of annexations, and although it is not necessary for my argument, I can fairly contend that, in a peaceful annexation such as the one in question, whereby His Majesty, without any reference to the people themselves, but relying solely upon their desire to be under his sovereignty, only made *de jure* what had been for years *de facto*, special leniency ought to be extended towards the *status quo ante*.

I will now proceed to deal with the facts. In considering the present position

of the Native Courts not under the Native Jurisdiction Ordinance, it is necessary to go back to the period when the Gold Coast was first constituted. By Letters Patent dated July 24, 1874, Her late Majesty declared that her settlements on the Gold Coast and at Lagos should constitute the Gold Coast Colony, and she further declared that the settlements on the Gold Coast comprised all her dominions on the Gold Coast and at Lagos. Under 6 & 7 Vict., c. 13, the original of the present British Settlements Act 1887 Her Majesty delegated to the Legislative Council of the Gold Coast Colony the power to legislate for such Colony, *i.e.* within her dominions.

Quite apart from the powers which she had over the Gold Coast Colony, Her late Majesty possessed power and jurisdiction over territories adjacent to the said Colony, and by an Order in Council dated August 6, 1874, under the Foreign Jurisdiction Act 1843, she empowered the same Legislative Council to legislate for such adjacent territories.

By virtue of these Letters Patent extending to the Colony, and this Order in Council extending to the Protected Territories, the Supreme Court Ordinance was passed in 1876, whereby a Supreme Court was constituted for the Colony and the adjacent territories. By s. 12 of this Ordinance the appellate jurisdiction over the Native Courts, which had been vested in the Judicial Assessor to the native chiefs, was now vested in the Supreme Court.

On January 15, 1883, an Ordinance was passed "to facilitate and regulate the exercise in the Protected Territories of certain powers and jurisdiction by native authorities." "Protected Territories" in the local Ordinances meant the Protected Territories on the Gold Coast, not those adjacent to Lagos, so that this Ordinance applied only to the Gold Coast. This Ordinance was passed, not by virtue of the Letters Patent, as it did not deal with Her Majesty's dominions, but by virtue of the Order in Council under the Foreign Jurisdiction Act.

The Courts mentioned in this Ordinance were the native popular Courts to which I have referred. The Ordinance did not apply generally to all such Courts, but only to such parts of the Protected Territories as the executive might choose to extend it. Nor did its application to any part of the Protected Territories abolish and re-establish the Native Court within such Territory; it only regulated their powers, whilst it gave the Government the power to suspend any Court for good cause (ss. 28 and 29).

On January 22, 1883, the Letters Patent of 1874 were revoked and fresh Letters Patent were made which, for the purposes of the present argument, may be taken to be exactly similar to the Letters Patent of 1874.

On January 13, 1886, fresh Letters Patent were issued revoking those of 1883, and separating Lagos from the Gold Coast. By these Letters Patent it was declared that "the Gold Coast Colony (hereinafter called the Colony) shall, until we shall otherwise provide, comprise all places, settlements, and territories belonging to us on the Gold Coast" within certain degrees of longitude, and the Legislature was empowered, under the heretofore-mentioned 6 & 7 Vict. c. 13, to legislate for the Colony so defined, *i.e.* for Her Majesty's dominions on the Gold Coast.

As the local Legislature under the new Letters Patent differed from the Legislature referred to in the Order in Council of 1874, a new Order in Council was made under the before-mentioned Foreign Jurisdiction Act 1843, empowering the local Legislature created under the new Letters Patent "to exercise and provide for giving effect to all such powers and jurisdiction as Her Majesty may, at any time before or after the passing of this Order in Council, have acquired in the said territories adjacent to the Gold Coast Colony."

It was about this time (1887) that a question arose as to the effect of ss. 11 and 12 of the Supreme Court Ordinance 1876 on the jurisdiction of the Native Courts in the Protected Territories, and the Full Court held in *Oppon* v. *Ackinnie* (Sarbah's *Fanti Customary Laws*, p. 232) that the Supreme Court Ordinance had not impaired the judicial powers of native chiefs in the said territories, and, by their judgment, the Full Court held that these Courts still possessed jurisdiction. This was the opinion upon which the local Government had always acted.

In March 1888 the local Legislature, in exercise of their powers under the Order in Council (not under the Letters Patent), passed the Foreign Enlistment Ordinance 1888 (No. 9 of 1888). It was not necessary to apply it to the Colony, as the Imperial Act applied there. S. 9 of this Ordinance as originally passed reads as follows:

> 9. In this Ordinance, if not inconsistent with the context, the following terms have the meanings hereinafter respectively assigned to them, that is to say:—
>
> "State" includes any country, colony, province or people, or part of any province or people *other than the Protected Territories and not forming part of the British dominions*, and any person exercising or assuming to exercise the powers of Government in or over any country, colony, province, or people, or part of any province or people *other than the Protected Territories and not forming part of the British dominions.*

It is noticeable that it is specially implied that the Protected Territories do not form a part of the British dominions.

In September 1888 an Ordinance was passed for the regulation of native prisons. This was enacted under both the Letters Patent and the Order in Council. S. 2 as originally passed declares as follows: "Every king and chief shall send to the Colonial Secretary on or before December 31, 1888, a list of the native prisons in that part of the Colony and Protected Territories wherein such king or chief exercises authority, and of the Native Courts to which such prisons are attached, and of the names of the persons who are respectively responsible for the management of such prisons." The rest of the Ordinance provides for the regulation of such prisons, and for their discontinuance. To this Ordinance Her Majesty gave her assent in October 1888. Her late Majesty, therefore, as far back as 1888 recognised the existence of native prisons in the Colony, *i.e.* in her dominions, and recognised the fact that Native Courts exercised authority within her dominions. The local Government acted upon the powers vested in them, and amongst the prisons and Native Courts referred to at pp. 571 and 572 of vol. i. of the Ordinances will be found several which were under the guns of the forts and which would therefore have been deemed to be within the Colony, *i.e.* within the British dominions.

In the Criminal Code (No. 12 of 1892), which applied to both the Colony and the Protected Territories, it is expressly provided that the term "prison" shall "not include any prison of a native king or chief" (vol. i. p. 671), and it is provided in s. 336 (vol. i. p. 805) that the provisions with respect to perjury shall not apply "to a Native Court or to any proceeding in or process issued by a Native Court." Here again Her Majesty recognised the existence of native prisons and Native Courts within her dominions.

In October 1894 the Roads Ordinance (No. 13 of 1894) was passed. It was "an Ordinance to provide for the better maintenance of the roads of the Colony," and the preamble is that "it is expedient to make provision for the maintenance in good repair of the roads of the Colony, and to give certain powers to chiefs for enforcing performance of the required labour." The title and preamble therefore

refer only to the Colony. In the body of the Ordinance, however, it is declared that the Governor in Council may apply it to any road "in any part of the Colony or Protected Territories," so that it was enacted by the local Legislature under the Letters Patent with respect to British dominions and under the Order in Council with respect to the adjacent territories outside the British dominions. By s. 5 it is declared that any person refusing to work under the Ordinance when called by his chief shall be liable, at the option of the chief, to punishment under Native Customary Law or on summary conviction before a District Commissioner (*i.e.* the Supreme Court) to a fine. Her Majesty assented to this Ordinance in December 1894. By this Ordinance Her Majesty conferred upon native tribunals exercising jurisdiction within the Colony, *i.e.* within her dominions, certain new jurisdiction, and permitted these tribunals either to exercise this jurisdiction themselves or to send the matter before Her Majesty's Supreme Court. In view of the fact that this Ordinance was primarily made for the Colony, as the title and preamble show, it is a strong instance of recognition of the Native Courts in Her Majesty's dominions.

Up to this date, therefore, we find that Her late Majesty not only recognised the fact that Native Courts exercised jurisdiction within the British dominions, but she also regulated their prisons, and furthermore conferred upon them fresh jurisdiction.

But difficulties were constantly arising[1] with respect to the distinction between the Colony and the Protected Territories, and in January 1895 a Revision Ordinance (No. 3 of 1895) was passed declaring (s. 2) that "'the Colony' shall mean the Gold Coast Colony and shall include the settlement on the Gold Coast and the Territories near or adjacent thereto wherein Her Majesty may at any time before or after the commencement of this Ordinance have acquired powers and jurisdiction." It was further declared (s. 4) that every Ordinance, past or future, should, subject to any express limitation therein contained, apply to the Colony as above defined. The local Legislature in passing this Ordinance purported to act in their dual capacity, *i.e.* for the Colony as well as for the Protected Territories. Whatever question there may have been as to the power of the local Legislature to do what they purported to do so far as the Protected Territories were concerned, there is no doubt that in enacting s. 4 they were acting within their powers so far as the Colony was concerned. Consequently the Native Jurisdiction Ordinance 1883, which had been hitherto applicable only to the Protected Territories, now became applicable to the Colony, *i.e.* to the British dominions.

There is no express limitation in the Native Jurisdiction Ordinance other than that it deals with the regulation of "the exercise in the Protected Territories of certain powers and jurisdiction by native authorities," but it might fairly be argued that this of itself is an express limitation. In view, however, of the terms of s. 2 I do not think that it could be held that the Native Jurisdiction Ordinance was outside the effect of s. 4. It is not necessary, however, to argue the point, as the question was settled by the Reprint of Statutes Ordinance 1896 (No. 14 of 1896), to which Her Majesty assented, the Commissioner under that Ordinance adopting the interpretation that the Native Jurisdiction Ordinance had been applied to the Colony as defined by the Revision Ordinance 1895, and the Governor approving of this interpretation (s. 7 of No. 14 of 1896).

Here, therefore, we have one more instance of Her Majesty recognising the existence of Native Courts within the British dominions, and in this case she goes the length of providing for the regulation of the exercise of their jurisdiction.

[1] I dealt with these difficulties in my judgment in *Bainyi* v. *Dantsi*.

Now can it be said that these Native Courts did not really exist within Her late Majesty's dominions because of the fact that the territory within which they would exercise jurisdiction was a part of Her Majesty's dominions? I do not see how that can be said. Had Her Majesty not recognised these Courts, I think it would be clear that it must be held that their jurisdiction ceased in respect of the British dominions, for it could not be assumed that Her Majesty would permit the exercise in her dominions of a jurisdiction not her own. But if Her Majesty was graciously pleased to permit such a jurisdiction, in assistance of her own Courts, and with an appeal to her Courts, she could do so; and, in view of the fact that Her Majesty regulated the prisons attached to the Courts within her dominions, excluded these prisons and Courts from the provisions of the Criminal Code, gave fresh jurisdiction to these Courts within her dominions, and finally provided for the regulation of the exercise of the jurisdiction of these Courts within her dominions, it would be unreasonable to say that Her Majesty had not permitted such jurisdiction. All these enactments assented to by the Queen and duly proclaimed and advertised throughout the whole country amounted to a definite recognition by Her Majesty, and show her consent that these Courts should exist within the British dominions.

It is to be emphasised that the enactments to which I have referred are all still in existence and still apply to the Colony, *i.e.* to His Majesty's dominions. I would further point out that the above enactments, so far as the Colony was concerned, were in exercise of the powers conferred under the Letters Patent and were *intra vires* and have therefore required no validation.

Having dealt with the effect of the Revision Ordinance 1895, so far as it was made under the Letters Patent, let us consider its effect so far as it was made under the Order in Council of 1887.[1] One such effect was to extend to the Protected Territories all Ordinances in force in the Colony, past and future. This could be done validly by the local Legislature only in so far as it could be done by Her late Majesty. Her Majesty could only legislate to the extent of her acquired powers, beyond that she could not go, consequently any Ordinance so extended by the local Legislature which went beyond that length would be, to that extent, invalid. If Her late Majesty or His Majesty subsequently acquired the necessary powers, the action of the local Legislature could be validated under the Foreign Jurisdiction Act as from the date of the acquisition of such powers, but not, I think, from an earlier date.

Another effect of the Revision Ordinance 1895 was practically to annex the Protected Territories to the Colony. Had s. 2 of this Ordinance merely enacted that "the Colony" should include the settlement on the Gold Coast and the Protected Territories, it might fairly have been argued that the term "the Colony" was only compendiously used for the two terms "Colony" and "Protected Territories." But the Legislature expressly declare that "the Colony shall mean the Gold Coast Colony" and then go on to say what it includes. The "Gold Coast Colony" must here be taken to mean the Gold Coast Colony as defined by the Letters Patent, *i.e.* "all places, settlements, and territories belonging to us on the Gold Coast between the fifth degree of west longitude and the second degree of east longitude." This is clear from the previous definition of "Colony" and "Colonial Waters" (see 1887 edition of Ordinances, p. 38), from the enacting clause of every Ordinance: "Be it enacted by the Governor of the Gold Coast Colony with the advice and consent of the Legislative Council thereof," and from

[1] It should be stated that the Foreign Jurisdiction Act 1843 was repealed by the Foreign Jurisdiction Act 1890, but the latter Act kept alive all Orders made under the previous Act.

the meaning of "Gold Coast Colony" in the Orders in Council of September 21, 1901. Assuming it to be valid, the effect of this legislation would be to incorporate the Protected Territories within the Gold Coast Colony as defined by the Letters Patent, *i.e.* to annex it to the British dominions.

This incorporation of the Protected Territories within the Gold Coast is more pronounced in the Statute Law Revision Ordinance 1898 (No. 1 of 1898). As I have already pointed out, in the Foreign Enlistment Ordinance 1888 it was specially implied that the Protected Territories did not form a part of the British Dominions. The Statute Law Revision Ordinance 1898 referred to the Foreign Enlistment Ordinance and made it applicable to the Colony, but did not go so far as to remove the distinction in it between the Protected Territories and the British Dominions. The Statute Law Revision Ordinance 1898 definitely removes that distinction by striking out the words "other than the Protected Territories and" in the section already quoted. It may well be argued that it was incorrect to apply the Foreign Enlistment Ordinance to the Colony, and that so soon as the Protected Territories became annexed to the Colony the Imperial Act on the subject applied and the local Ordinance became inoperative. That may be so, but nevertheless the fact remains that in 1898 the local Legislature crowned their action of 1895 by definitely removing the large vestige of distinction between the Gold Coast Colony and the Protected Territories and that they did so in such a way as to show that they intended to incorporate the Protected Territories as part of the British dominions.

I do not propose to argue that their action was valid, for Her late Majesty did not possess, under the Foreign Jurisdiction Act, and therefore could not delegate to them, such powers, but it was to validate this action of the local Legislature that in 1901 the two Orders in Council were passed. To this point I have already drawn special attention in my judgment in *Bainyi* v. *Dantsi*.

The two Orders were passed the same day, September 26, 1901, and were brought into operation in the Colony the same day, January 1, 1902. One was a Revocation and Validation Order, the other was a Boundary Annexation and Ordinance Extension Order. Though these two Orders came into force the same day, the Revocation and Validation Order must, theoretically, be taken to have been made before the Boundary Annexation and Ordinance Extension Order, as the first was made, in part, under the Foreign Jurisdiction Act, an Act which deals only with territory out of His Majesty's dominions. I do not know that any practical argument can be drawn from the theoretical sequence in which these two Orders in Council came into force, but I will consider the effect of the Revocation and Validation Order first.

The Revocation and Validation Order in Council is not made solely under the Foreign Jurisdiction Act, but "in pursuance of the powers by the Foreign Jurisdiction Act 1890, or otherwise in His Majesty vested." By Clause I. the Order in Council of 1887 is revoked; that is done directly under the Foreign Jurisdiction Act. By Clause II. "all Ordinances or reputed Ordinances enacted or purporting to have been enacted by the Legislative Council for the time being of the Gold Coast Colony, for the purpose of giving effect to any such powers and jurisdiction as her late Majesty . . . may at any time before or after the respective dates of such Ordinances have acquired in the" Protected Territories and which have received assent "shall be, and be deemed to have been, valid and effectual from the date of such assent *for all purposes whatsoever*." The effect of this clause is to validate what the local Legislature did or attempted to do in the Statute Law Revision Ordinances of 1895 and 1898 with respect to the Protected Territories. It is not easy to see how this clause could have been made under the authority of the Foreign Jurisdiction

Act,[1] for if Her Majesty had not at the time of assent acquired the necessary powers and jurisdiction it is difficult to explain how validation can, under the Foreign Jurisdiction Act, date back to the time of assent. It is not, however, necessary to discuss further whether this clause could or could not have been made under the Foreign Jurisdiction Act, as it was also made by virtue of the powers "otherwise vested in His Majesty." One thing that the local Legislature purported to do by the Revision Ordinance in exercise of their powers under the Order of 1887, but which they had no power to do, was to extend to the Protected Territories all Ordinances of the Colony, past or future; this is validated. Another thing that the local Legislature purported to do, but which they had no power to do, was to incorporate the Protected Territories within the Gold Coast Colony, *i.e.* within the British dominions; this is validated, for all purposes whatsoever. This His Majesty has power to do, not under the Foreign Jurisdiction Act, but under the same powers that are exercised in the Order in Council of even date.

Assuming that this Validation Order in Council had been the only Order made by the King, would it not, taken together with the enactments of the local Legislature, have been held to have incorporated the Protected Territories within the Gold Coast Colony? The local Legislature enact that the Protected Territories shall be included in the Gold Coast Colony (the Gold Coast Colony having a special meaning), provide for all Ordinances, unless expressly limited, applying to the Gold Coast Colony, and entirely do away with the Protected Territories; they further impliedly declare that the Protected Territories shall form part of the British dominions. To all this Her late Majesty assents, and thereby gives the Acts of the local Legislature all the validity that it is within her power to give under the Foreign Jurisdiction Act. His Majesty, finding that the action of the local Legislature was beyond the powers vested in them and beyond the powers vested in Her late Majesty under the Foreign Jurisdiction Act, now ratifies what was done, *i.e.* the inclusion of the Protected Territories within the Gold Coast Colony, the implied declaration that the Protected Territories form part of the British dominions, and the extension of all Ordinances equally to the whole territory; their action becomes his action. His ratification is for all purposes whatsoever. And His Majesty does this not only under his foreign jurisdiction powers, but also under any other powers (including the power to annex) in him vested. Is not this an annexation by the King of these Protected Territories? Would not territory so acquired be just what is meant by "British settlement" in s. 6 of the British Settlements Act 1887 (50 & 51 Vict. c. 54)?

The other Annexation Order of even date was not necessary so far as the particular Protected Territories dealt with by the local Legislature were concerned; but it was necessary for the purpose of showing the exact limits of the Gold Coast Colony and of covering any territory which may have remained unannexed within those limits.

The annexation of the greater portion of the Protected Territories therefore dates back to 1895, and the King, in Clause III. of the Validation Order, approves all that has been done in the Protected Territories under the above-referred-to enactments since 1895. During that period Native Courts were brought under the Native Jurisdiction Ordinance (vol. i. p. 406), and native prisons attached to Native Courts were added under the Native Prisons Ordinance (vol. i. p. 571). This the King has declared to have been lawfully done, though the territory

[1] The possibility that Her Majesty, though not possessing the necessary powers at the date of the passing of these Ordinances, acquired them before assent is barred by the fact that these Ordinances were assented to on the day of passing.

concerned was part of the British dominions. So also numerous roads have been brought under the Roads Ordinance (vol. ii. pp. 979–84), and though these roads have been within the British dominions the King ratifies the jurisdiction conferred upon the native tribunals either to punish offenders or to send them to the British Courts. In fact His Majesty confirms the recognition within the British dominions of these Native Courts by Her late Majesty and declares that the executive were acting lawfully in recognising and regulating these Native Courts though within the British dominions. No further pronouncement was necessary; the facts speak for themselves.

Besides the Revocation and Validation Order in Council there was the Boundary, Annexation and Ordinance Extension Order in Council. This Order after reciting the definition of the Gold Coast Colony in the Letters Patent declares that it "is expedient that the boundaries of the Gold Coast Colony should be further defined and that all such portions of the territories on the West Coast of Africa *which have not already been included within His Majesty's dominions* should be annexed to, and should henceforth form part of, the said Gold Coast Colony."

Clause II. of the Order then gives the territorial limits of the Gold Coast Colony.

Clause III. declares that all such parts of the territories within the said limits as have not heretofore been included in His Majesty's dominions shall be annexed thereto and shall form part of the Gold Coast Colony.

Clause V. provides that from the date of the coming into force of this Order all laws and Ordinances which were at that date in force in the Gold Coast Colony shall take effect within the limits of this Order and shall remain in force until altered or repealed. By this clause His Majesty extends to the annexed territories "which have not already been included within His Majesty's dominions" (Clause I.) the Native Jurisdiction Ordinance, the Native Prisons Ordinance, the Roads Ordinance, and every other Ordinance hitherto passed. Here again by his act His Majesty shows his will. Her late Majesty by applying the above Ordinances to the Gold Coast Colony could not be taken to have done otherwise than to have accepted Native Courts with jurisdiction within her dominions; His Majesty by the Validation Order declared that the action of the local Government in dealing with these Native Courts on the basis that they had jurisdiction within the British dominions was lawful; and by this Order His Majesty extends to the newly annexed territories Ordinances which specifically deal with Native Courts within the British dominions. What further pronouncement was necessary? It must, at least, be presumed that the King knew the obvious and logical effect of this clause. Any further pronouncement would have been superfluous and would have cumbered the Order in Council. Quite apart from all the previous arguments, the King, by his extending to the newly annexed territory all the Ordinances which are in force in the Gold Coast Colony, has declared his will that these Native Courts should continue to exist within his dominions. In other words he recognises them just as he recognises those which have been already brought under the Native Jurisdiction Ordinance and which, it is admitted, still exist.

All the facts show that what His Majesty intended was to make *de jure* what had been, since 1895, *de facto*, and that the same state of things should continue for the future. No provision is made for cases pending in Native Courts in the annexed territories, no provision is made for prisoners in native prisons, either in native prisons in the annexed territories or in native prisons existing under the Native Prisons Ordinance in the Colony; everything is to continue just as it was under the previous state of law, including the ancient Native Courts formally recognised and used (in the Roads Ordinance) by Her late Majesty within the

British dominions and now again recognised and still used by His Majesty in the newly annexed territories.

When once all the facts are known, the intention is patent. This intention was glaring to the executive, His Majesty's local representatives, and since these Orders of 1901 have come into force they have extended the Native Jurisdiction Ordinance to over a dozen Native Courts all clearly and undoubtedly within His Majesty's dominions. Surely this will not require further validation. Not only have the local executive done this, but they have, since 1902, passed two Ordinances recognising the position of native chiefs generally, and to these Ordinances His Majesty has given his assent. A native chief may not connote a Native Court, but native chiefs and all that there is of organisation among natives is closely bound up with the Native Courts.

To sum up my arguments: I lay down the broad proposition that the Crown may in annexing territory consent to the continuance of ancient local Courts; I contend that it may do so impliedly, and that it is only upon this assumption that the Native Courts under the Native Jurisdiction Ordinance exist; that Her late Majesty recognised and consented to Native Courts generally within our dominions; that His Majesty has by his two Orders in Council been further graciously pleased to recognise these Courts, both those under the Native Jurisdiction Ordinance and those not under that Ordinance; and, although I think it unnecessary, I have drawn attention to the fact that in seeking His Majesty's intention we are entitled to have regard to the very special circumstances in which the annexation took place.

The Native Courts not having, in my opinion, been abolished, I am bound by the judgment of the Full Court in *Amocoo* v. *Duker* in its entirety. Consequently I must hold that the land Nkraisiam or Bessim where the trespass took place is the property of the plaintiff. How far this land extends I am unable to say. The only way for the plaintiff and Kobina Annan to ascertain their boundaries is to ask the Court to fix them under the Boundaries Ascertainment Ordinance 1905.

There will be judgment for the plaintiff against the defendants Kobina Annan and Kobina Inketsia for £5 and the general costs of the actions and against the defendant Kudu for 40*s*. and the special costs of the actions against him, counsel's costs allowed in each case separately up to consolidation only. In taxing the costs I shall allow plaintiff only half the taxed costs for the plan, as owing to his not having taken the proper steps towards getting the defendants to join in the survey, the plan has lost half its value.

NOTES.

Comparative Law in Blue Books.—It is proposed to publish in each number of the Journal a list compiled by Mr. Bedwell, of the Middle Temple Library, of the Parliamentary papers, issued since the last number, which may be considered as supplementary to the Review of Legislation.

Bankruptcy.

The Departmental Commttee appointed to inquire into the Bankruptcy Law and its administration received evidence as to the practice in other countries. Mr. Ernest Schuster informed them as to the Bankruptcy Law and Procedure in Germany; M. Astoul, counsel to the French Embassy, gave evidence as to France; Mr. B. R. Wise, K.C., formerly Attorney-General of New South Wales, explained the provisions in that State; Mr. Peter Morrison dealt with Scotland; and Mr. Houston, the Registrar of the Belfast Bankruptcy Court, spoke as to Ireland. Mr. W. H. Monck, Chief Registrar in Ireland, also sent a memorandum. (Vol. ii. Minutes of Evidence, Cd. 4069. 3*s.* 4*d.*)

Commerce.

Report by His Majesty's Ambassador to the United States on legislation in the different States in regard to gambling in "options" and "futures." (Cd. 3863. 2½*d.*)

Education.

Statement prepared by the Board of Education as to the age at which compulsory education ceases in European countries, the United States, Canadian provinces, and the States of Australia. "The most generally accepted age is fourteen years." (Cd. 4132. 2*d.*)

Elections.

Report from His Majesty's representatives abroad showing the regulations and methods which guide the application of the second ballot at elections in foreign countries. (Cd. 3875. 3*d.*) [This paper includes the European countries and the United States.]

The machinery and cost of elections to legislative assemblies in the self-governing British Colonies. (Cd. 3919. 2*s.*)

Mercantile Marine.

The laws of European countries and Japan as to the obligations of the owners of merchant vessels towards their captains, officers, and seamen, with regard to the following: Old Age Pensions, Pensions to Widows and Orphans, Accident Compensation, Sunday Labour, Daily Hours of Labour at Sea and in Port, Payment for Work performed in excess of fixed hours of labour, Medical Treatment, Accommodation and Passages of Distressed Seamen; also the regulations of each country for the preservation of discipline on board their merchant ships. (H.L. No. 14. 9*d.*)

Native Labour.

List of laws dealing with the emigration of labourers from the British East Indian colonies to foreign countries. (Cd. 3827. ½*d.*) [This contains merely the references to the numbers of the Ordinances without any particulars of their contents.]

Return by the Colonial Office respecting compulsory native labour in the Colonies of the Empire. (No. 20, 1908. 3*d.*) [British Honduras, Ceylon, Cyprus, Fiji, Gambia, Gold Coast, Natal, Northern Nigeria, Southern Nigeria, and Uganda employ compulsory native labour. Particulars are given of the class of natives, the conditions of employment, and the regulations, together with the legislative authority for the introduction of the system. A despatch is included from the Governor of the Leeward Islands drawing attention to a law bearing upon the subject.]

Witnesses and "Confidentiality."—The current number of the *Juridical Review* contains an interesting article by Mr. Oswald Dykes on "Confidentiality in the Law of Evidence." The matter is one of practical importance, because these confidential communications so often go to the heart of the mystery, and their admission or rejection may prove decisive. At first sight great diversity of view seems to prevail among the nations; but when we get to the root of the matter we find the differences narrow to a very simple issue. All systems of law respect more or less "confidentiality"—recognise, that is to say, that there is a legal duty on the part of the recipient of a confidential communication not to disclose it voluntarily. A doctor, for instance, who betrays a secret disclosed to him professionally is, according to Scotch law, liable to an action (*A.* v. *B.* 1851, 14 D. 177).

The difference is in the extent of the recognition accorded to such confidences. Among certain nations—mainly those where the English Common Law prevails—the private privilege of confidentiality is subordinated to the interests of public justice requiring disclosure: among other nations—chiefly those who have come under the influence of the Canon Law—the privilege is absolute, even in the witness-box. So absolute was the protection given by the Canon Law to communications made under the seal of confession, that a priest was not only forbidden to disclose such secrets, but he might lawfully swear that he knew nothing of the subject.

Among modern codes, that which goes furthest in favour of confidentiality is the French Penal Code. Section 378 enacts as follows: "Les médecins chirurgiens et autres officiers de santé, ainsi que les pharmaciens, les sages-femmes, et toutes autres personnes dépositaires, par état ou profession, des secrets qu'on leur confie, qui hors de cas ou la loi les oblige à se porter dénunciateurs, auront révelé ces secrets, seront punis d'un emprisonnement d'un mois à six mois, et d'une amende de cent francs à cinq cents francs." "Toutes autres personnes dépositaires" here has a wide signification. It has been interpreted to include "barristers, attorneys, and priests." It is noteworthy that many of the States of the American Union have been passing Acts to vary their English Common Law and protect confidential communications. These Acts differ naturally in detail; but as a general rule they debar a medical man, and occasionally a clergyman also, from giving evidence of matters which have come to his knowledge while acting in his professional character. It is "pretty to observe," as Mr. Pepys would say, how in these modern materialistic days questions of confidentiality have shifted from the priest to the doctor.

A Belgian Institute of Comparative Law.—Belgium, it is gratifying to find, has established its Institute of Comparative Law, and the admirable introduction prefixed to the first number of the *Journal* of the Institute shows that we have now in that country an organised band of lawyers, scholars, historians, and politicians who are likely to prove enthusiastic collaborateurs in the cause. The Institute is under the Presidency of the Minister of Justice, and the patronage of the most distinguished judges. Its object is the study of the laws of different countries, particularly the new laws, and the furnishing of a brief summary of their effect: but over and above this it has a practical end in view—"signaler aux pouvoirs compétents les progrès réalisés dans tous les domaines de la legislation, dans tous pays déterminé: organiser, en connexion avec l'Institut international de Bibliographie, un service de documentation, en matière de droit comparé. Ce double but distingue et differencie notre Société d'autres sociétés similaires, en fait un organisme scientifique spécial, écarte la critique de double emploi." The introduction goes on to point out that the science of comparative law—which is a modern science—cannot but grow in importance as distances diminish and the nations are drawn closer to one another. But it is not by merely bringing together the text of foreign laws that good is to be done: we must get at the underlying ideas common to them, noting how often the same principle—trial by jury, for instance—may develop quite differently in different countries. Thus we—in England—furnish a useful object-lesson seen as others see us. "Rien n'est plus frappant," says the writer of the introduction, "que la ressemblance des Anglais et des Romains, au regard des institutions politiques et sociales. Chez les deux peoples un même respect du précédent, la même influence de la religion, de l'aristocratie, et des

mœurs: la coutume passant avant la loi, la jurisprudence tenant lieu de code: le respect scrupuleux des formes, combiné avec le respect de la liberté: enfin le même désir immoderé de domination et de puissance. Il y a autre chose que du hasard dans de pareils rapprochements, il y a là une étude toute nouvelle qui récompenserait celui qui se donnerait la peine de s'y livrer." Meanwhile we offer our best wishes and congratulations to the new society. May not the time come, as these societies of comparative law multiply, that they should be federated for the working out of their common objects?

The Spread of Children's Courts.—A year or two ago the Children's Court was a thing unknown. Now we find it springing up everywhere—in response to that growing "pueris reverentia," which is so marked a characteristic of modern legislation. Mr. Bridgewater, who lately contributed a valuable article on the subject to this *Journal*, again takes up the tale with tidings that Children's Courts have now been established at Breslau, at Cologne, in Bavaria and Wurtemberg, and finally in Berlin—one in the centre of the city and another in the Rixdorf Quarter. This is the doing of the German Emperor, who sent over a representative to see the working of the system in the first Court established here—at Birmingham. In opening the Court at Rixdorf, which consists of three Judges, the President—Dr. Köhne—stated that the functions of the Court were: first, to prevent the youthful trangressors against the law from coming into contact with old and hardened offenders; secondly, to entrust the task of dealing with youthful offenders to Judges specially trained for such duties; and thirdly, to supplement judicial treatment by a subsequent course of superintendence and control. In order to achieve this last object, the Court counted, he said, upon the co-operation of charitable organisations and philanthropic persons, as well as of schools and school-teachers. The President further requested the representatives of the Press not to mention the names of the offenders who were brought before the Court, so as not to make heroes of them in the eyes of their companions; from which we may moralise the mournful truth, that the morbid craving for notoriety at any price—even when it means figuring as a criminal—has its seat in the bosom of the juvenile German as well as the juvenile Briton. Similar legislation is on its way in the Austrian Parliament.

Maitland's "Constitutional History of England."—The Editors are indebted to Mr. J. E. Hogg for the following notice:

"Three reasons are given by the editor, Mr. Fisher, in his preface to this volume, for the publication of a course of lectures written and delivered twenty years ago. These reasons are, shortly, that this posthumous book will show how well Maitland could popularise knowledge, that it contains some new and original ideas not elsewhere elaborated, and that it is likely to be of practical use both to teachers and students. A perusal of the book amply justifies these opinions. In many cases footnotes have been

added in order to call attention to statutes passed since 1888, and reference is made even to the Territorial and Reserve Forces Act 1907 and the Criminal Appeal Act 1907. There is room for more of these footnotes, as for instance, references to the Demise of the Crown Act 1901 might well have been inserted at pages 297 and 374. So much for the students' own particular point of view. The book is a delightful one to read, with its so characteristic turns and phrases. Who but Maitland could say (p. 131): 'Superstitions look odd when they have ceased to be our own superstitions'; (p. 479) 'The writ runs in the Queen's name—"Victoria D.G. commands the sheriff to an execution"—but Victoria cannot stop the issue of the writ'; (p. 437) 'Practically, then, we have come to have a king with a salary'?

"But, chiefly, this posthumous book of long-delayed publication is a real contribution to juridical literature. It is sometimes as valuable to possess the expression of an idea in embryonic form as to possess its full-grown development, and many of Maitland's best-known views may here be seen in embryo. Any one who has read the 'History of English Law' will readily seize on instances of this in the earlier part of the lectures. Again, the mere suggestion of an idea, which is not then worked out any further, frequently proves valuable in the future by taking root in another mind. The section on 'Retrospect of Feudalism' (pp. 141-164), going as it does beyond the immediate subject in hand, contains a number of hints which can hardly fail to produce good fruit if only they find kindly soils to grow in. 'In this country any talk of a feudal system is a comparatively new thing' (p. 141); and on p. 142 we are told that the new learning respecting feudal law introduced by Spelman 'was popularised and made orthodox by Blackstone in his easy, attractive manner.' Then, as to the relation between Bracton and Littleton—has any one ever drawn a careful comparison between the *De Legibus Angliæ* and the *Tenures*? Such a comparison was possibly included among the topics omitted for want of time (pp. xvii and 226). The dominant note struck, or if another metaphor be preferred, the single thread running through the description of English law at each of the five selected periods, is the unity that exists between constitutional law and land law. At the beginning of Period I. (p. 23) Maitland says: 'It may seem strange that we begin our survey of public law by examining the system of landed property.' At the end of Period V. (p. 538) we are told: 'We can make no progress whatever in the history of Parliament without speaking of tenure; indeed our whole constitutional law seems at times to be but an appendix to the law of real property.' Both constitutional lawyer and real-property lawyer will read Maitland's speculations and reasoned conclusions with the greater interest because of this interlacing of the two subjects, and each will unconsciously learn more than he intended of his rival's sphere. The main point of interest from the constitutional point of view is the position of the Crown in English Law—to what extent has prerogative been overridden by statute? From the real-property lawyer's special point of

view, the survival of the theory of tenure, and its wide divergence at the present day from the actual facts of land-ownership, will probably be the most attractive part of the subject. For many years, one may safely say, no one will be found to rival Maitland in his faculty of combining these two distinct sides of our law in a single presentation."

Bankruptcy in France.—"They do these things better in France," we are tempted to exclaim, with the author of *The Sentimental Journey*, in reading the evidence as to the bankruptcy system in France given before the Board of Trade Bankruptcy Committee that has just reported. France, to begin with, has a very high standard of commercial honour. More than a hundred years ago the National Convention resolved that a man who had contracted a debt should never be free from liability to pay it, and to that ideal France has steadily adhered and still adheres in this sense, that an insolvent debtor cannot be civilly "rehabilitated" until he has paid every penny he owes; and though the relief of bankruptcy is now conceded, the privilege is confined to traders. But it is in its disciplinary dealing with offending debtors that the superiority of the French methods discovers itself. Here in England a debtor may evade, and does evade, retribution for his offences by the simple expedient of not applying for his discharge. There is no machinery to compel him to face that ordeal, and it is not worth anybody's while to prosecute for criminal offences. In France the debtor must be punished if he commits any of the offences comprehended under the terms "banqueroute simple" and "banqueroute frauduleuse." Extravagance in living, gambling or speculation, giving fraudulent preferences, staving off bankruptcy by buying things on credit and re-selling them below their value—all these fall within the category of "banqueroute simple," and are punishable with imprisonment varying from one month to two years. The worse offences of making away with books, concealing property, or fabricating fictitious debts—which constitute "banqueroute frauduleuse"—are visited with the French equivalent of penal servitude—*travaux forcés*—from five to twenty years. Even simple insolvency—*faillite*—may be punished, if the trader fails to file his petition for fifteen days after finding himself insolvent. This is another feature of the French system not without its lesson for us; for it is the struggle to keep going on the part of a debtor who is hopelessly insolvent which so often plunges him deeper in the financial quagmire, and leads to those reckless borrowings, fraudulent preferences, and fraudulent settlements that furnish the chief occupation for the Court in Bankruptcy. The difficulty is that "knack of hoping" which so many debtors share with Goldsmith—witness the inflated estimate which they put upon their assets in the statement of their affairs. How are we to combat this incurable optimism?

A Survey of Recent Labour Legislation.—This is the second number of the *Bulletin of the International Labour Office* published in English, and it furnishes a very striking record of what is being done by the Legislatures

of the world to improve the lot of the workers. Specially we may note the solicitude for the young. Thus in Prussia a Ministerial Decree requires the local police authorities to keep a register of undertakings employing children (other than members of the employer's family), and to transmit it from time to time to the inspectors of industry for the district. Another Prussian Decree deals with breaks in the hours of work in the case of children under fourteen and young persons between fourteen and sixteen. In the Netherlands four Royal Decrees provide for the protection of young persons and women working at poisonous trades or dangerous processes. Thus they may not be employed below ground, in mines; in lead, mercury, or phosphorus works; in the manufacture of explosives, in carrying excessive weights, or in dangerous artistic performances. In cases where they may be legitimately employed, there are detailed provisions for securing sanitary conditions. In the United Kingdom, as we know, the Legislature has prohibited the employment of children and young persons under sixteen in certain industries without a certificate of fitness, and has provided free meals for necessitous children attending school. In the Argentine Republic and in Bohemia Decrees have been passed for securing Sunday rest, and France and Switzerland have both made elaborate provisions on the same subject. Belgium has been legislating for the prevention of accidents in harbours; and it was quite time it did so, for the number of accidents in Antwerp Harbour alone in one year amounted to 2,500. This is at the rate of ten per cent. on the number of workmen employed in the harbour—from 25,000 to 30,000. In Russia a Ministerial Order regulates work in workshops. The maximum day is fixed at twelve hours, which includes breaks amounting to two hours. Employees under seventeen must be allowed three hours a day for attending school. Local authorities and governors may prescribe shorter hours, and for the purpose of assisting their discretion mixed committees are constituted, consisting of representatives of the urban authorities, employers, and employees in equal proportions. Spain protects day wages of less than $2\frac{1}{2}$ pesetas from liability to attachment. Italy supplements the provisions of the Act of May 12, 1904, which regulates workmen's productive co-operative societies working in connection with public contracts. France has extensively amended the Housing Act of 1894, and now empowers charitable and aid societies, asylums, hospitals, and savings banks to devote not more than one-fifth of their property to building workmen's dwellings, or investing it in workmen's building societies. Germany has been working out the subject of Employment Bureaux. Altogether the prospect is a most encouraging one; and the International Labour Office at Basle could not be doing more useful work than it is doing in thus bringing before us in this *Bulletin*, in all its varied forms, this world-wide and beneficent activity on behalf of the workers.

The Taint of a Betting Transaction.—English law, it would seem from a recent decision in the Natal Law Reports (vol. 28, 140), *Sandeman* v.

Solomon, is not quite so severe in discountenancing betting as Roman-Dutch law. At Common Law, wagers in England, as Mr. Justice Hawkins pointed out in *Reid* v. *Anderson*, were not illegal, and in fact, prior to 8 and 9 Vict., c. 109, actions were constantly brought to recover money won on them. The object of 8 and 9 Vict., c. 109, was not to make wagers illegal, but simply to make the law no longer available for their enforcement, leaving the parties to pay them or not as their sense of honour might dictate. Therefore, if A hands money to B to pay a gambling debt, and before B does so A changes his mind, and says to B, "Pay me back that money," there is nothing to prevent A recovering the money: so Cockburn, C.J. and Mellish, L.J. held in *Taylor* v. *Bowers* (1 Q. B. D. 291), the rationale of the decision being that the law in such a case, so far from being used to execute the corrupt bargain, is being used to undo it and prevent its performance. Roman-Dutch law is more severe. It does not permit this "locus poenitentiae" on the part of the debtor, but confronts him with the principle "In pari delicto melior est conditio possidentis." It is certainly a nice question of legal casuistry. But how are we to get a firm ethical footing on these quicksands, when we find from a recent case that if you lend money to a friend to play roulette at Monte Carlo you may recover it back, but if you lend it him to back a horse at Goodwood you cannot?

Ministry of Labour.—Among the many items of interesting information in the latest number of the *Bulletin of the International Labour Office*, published by the International Association for Labour Legislation, is an account of the Ministry of Labour and Friendly Societies created in France. It has a wide scope of action: the regulation of the conditions of labour, the relations between employers and employed, assistance to workers in case of disablement or old age, and statistics relative to labour. It does not include agriculture or commerce or mines. Otherwise the whole field of labour is comprehended in the jurisdiction of the new Ministry. It is interesting to note that M. Louis Blanc proposed such a Ministry in 1848, and that his suggestion is now realised.

The Contract of Affreightment.—The question what law is to be applied in construing charter-parties and bills of lading gives rise to much difference in judicial opinion in England. The point is equally in dispute in the Courts of other countries. The last number of the *Zeitschrift für Internationales Privat und Offentliches Recht* describes a case which is illustrative of this. A vessel belonging to an English company was chartered by a German charterer to deliver goods at two French ports, Granville and Dunkirk, and thence to proceed to Spain. The vessel was injured, and the cargo was landed on the quay at Granville, the consignees refusing to accept it. The vessel was repaired at that port and proceeded to Southampton. The Court of first instance held that French law applied as to whether distance freight was payable; the law of the place of performance governed the duties which

have to be performed at such place. On appeal the decision was revised. The principle of construction relied upon, it was said, had no application to the legal consequences of an accident which the parties did not foresee; that a charter entered into in London by English owners and German charterers of a vessel which was to go to Spain after discharging cargo at French ports, should be construed according to French law was quite unreasonable; the English law does not recognise distance freight; the German and French laws recognise distance freight, but in different manners; and it was impossible to suppose that the parties bargained with reference to the latter. In the end the Court of Appeal decided that German law applied. Surely it will be possible one day to obtain general acceptance of an intelligible, easily applied rule in regard to a difficulty often recurring.

The Common Law and Divorce.—In the recent number of the *American Journal of International Law*—a quarterly periodical which promises to be of great value to students of international law—there is a report of a case which came before the United States Court for China. Primarily the question was whether this Court had jurisdiction in matrimonial cases, including divorce. That question resolved itself into another, and one of some interest—"whether the law on the subject (divorce and separation), as administered by the ecclesiastical Courts, constituted a part of the Common Law of England which had been introduced into the United States at the date of the change of sovereignty." Bishop, in his well-known work on *Marriage and Divorce*, laid it down that such law was transplanted. The contrary view had been expressed by Chancellor Sanford in *Burlis* v. *Burlis*; and the Judge of the United States Court for China agreed with that doctrine. The decision is remarkable for more than one reason: first, the Court had actually issued regulations as to divorce; and, secondly, the same Court held that it had jurisdiction as to probate matters, peculiarly an ecclesiastical matter. It will be noted that in *Watts* v. *Watts* the Judicial Committee of the Privy Council has decided that the Divorce and Matrimonial Causes Act 1857 was introduced into British Columbia by a proclamation declaring "English law" to be in force in that Colony.

English and German Judicial Systems.—Among the interesting discussions reported in the *Jahresbericht* of the Juristentag is one relative to English judicial organisation; a subject which is now exciting, and has for some time excited, much interest in Germany, owing chiefly to the efforts made by Dr. Adickes, the energetic Burgermeister of Frankfort, to bring about a change. Professor Gerland, who opened the discussion, made a comparison between the English and German judicial systems, on the whole favourable to the latter. It is difficult to compare systems so much unlike. But it would be useful to have an important study of the working of the one-judge system and the collegiate system. Some important observations on the subject are to be found in an article in a recent number of the

Preussiche Jahrbücher by our contributor, Dr. Julius Hirschfeld, entitled "Englisches und Deutsches Justizwesen," and in a pamphlet entitled *Richter und Master; ein Betrag zur Würdigung des englischen Zivilprozesses*, by Dr. Otto Koellreutter.

Presumption of Death.—The subject of disappearance and the circumstances under which death will be presumed was a favourite topic with mediæval jurists. The Continental literature on the subject is copious; and one treatise in particular, Bruns's, is well known. The question often comes up in our Courts, but there is, so far, no book exclusively devoted to the subject. Any English author who meditates a book upon this subject will get much aid from Dr. Elemer Balog's learned work entitled *Verschollenheit und Todeserklärung*, according to German and Hungarian law. The Hungarian jurist has discussed aspects of the case rarely arising in English Courts. The chapters of this work include such subjects as the effects of a declaration of death on person and property, marriage in case of such declarations, declarations of the death of foreigners, the legal effect of judgments declaratory of death. Particularly interesting is Dr. Balog's discussion of the effect of marriages celebrated during absence within the prescribed time. The Roman law contained few precise directions on the subject except as to prisoners of war. But a gloss on a passage in the Digest stated that he who was missing was not presumed to be dead until a hundred years had passed. In Germany the words of the Psalmist were taken as a guide, and the limit was fixed at seventy. Under the new Civil Code there is a complicated system of presumptions. If the missing person should be under seventy, no news of him for ten years is conclusive; if seventy or over, five years. There are shorter periods fixed for those who have been engaged in war or been in a ship wrecked or presumed to be wrecked. The effect of a judicial declaration of death is curious. The existence of the person declared to be dead does not annul a second marriage if one of the parties was ignorant of this fact; the effect is to annul the first marriage. But either of the parties to the second marriage who was ignorant may, within six months of becoming aware, take proceedings to annul the second marriage. Obviously such a law lends itself to great complications, which are discussed with minuteness and acuteness in Dr. Balog's interesting volume.

We note an instructive discussion at page 176 of the question, not expressly determined by the German or Hungarian Codes, of the effect on foreigners of a "declaration of death." Dr. Balog confines himself to the legal side of the problems which he discusses. "Lassen wir die philosophie," he remarks, after having been drawn for a few lines into consideration of the case of Ulysses and Penelope. But from time to time the exposition introduces the reader to problems of great social importance.

Vinogradoff's "English Society in the Eleventh Century."—Mr. J. E. Hogg sends the following note on this interesting work: "This book—

having as its sub-title 'Essays in English Mediaeval History'—is dedicated 'to the memory of F. W. Maitland.' There are two of these 'Essays,' the first on 'Government and Society,' the second on 'Land and People.' The subjects treated of in the first Essay are 'Military Organisation,' 'Jurisdiction,' and 'Taxation'; in the second, 'Land Tenure,' 'Rural Organisation,' and 'Social Classes.' The principal document used as an authority is, of course, Domesday Book; in the footnotes are given very full extracts from passages in Domesday and other records, and in addition there are no less than ten appendices, one being a copy of the Middlesex Hundred Roll of 1279.

"A picture of England as she was in the eleventh century is thus presented, with ample material for the use of those who may wish either to verify the truth of the presentation, or to work out for themselves any part or view in greater detail. The Conquest of 1066 was the instrument by which the twofold garment of social and juridical England was knitted into one, and the Domesday Survey of 1086 is the best record of the manner in which the work was done. The chief lesson to be learned from a study of the changes effected by the Norman Conquest is that there is a far greater degree of continuity than is often supposed in the history of our institutions, as they existed before and as they existed after the Conquest. The thing, the facts, existed substantially in many instances before the Conquest; the name, the theory, were brought by the Conqueror. The thanes were the predecessors of the feudal *milites* (pp. 81, 409). The manor described and helped to crystallise already existing institutions (p. 340). The man who could go with his land where he would, and sell to whom he pleased, became the holder of a *liberum tenementum* (pp. 407, 413). The importance of the eleventh century in English history is that it constitutes, in Professor Vinogradoff's phrase, a 'watershed' in the development of English society (p. 1). The feudalism then introduced was the 'watershed' between two distinct epochs (p. 213). The present book is not, of course, concerned with subsequent events and evolution, but it is justly pointed out (p. 213) that the feudalism brought in by the Normans was 'an attempt to connect military organisation directly with agricultural husbandry.' To lawyers, who really desire to understand whatever in our law can be made intelligible, the study of the eleventh century is of first-rate interest and importance, for with the feudalism then introduced came the theory of a system of land-ownership which has outlived the system in which it was embedded. Many of the extraordinary inconsistencies and difficulties in our antiquated law of the ownership of land can be much more easily explained and smoothed away if the genesis of that law is properly understood, and particularly if the circumstances and conditions immediately preceding the Norman Conquest in England are borne in mind. Professor Vinogradoff is careful to point out (p. 2) that there was no such thing as a 'reception' of foreign law in England at the Conquest as Roman law was 'received' in Germany in

the fifteenth century. The difference that actually took place might perhaps be better described as a change rather than a break. Possibly a very modern phrase will help to give the right point of view:—may it not be said that the Norman feudalism took effect, when once the Conquest was an accomplished fact, by a sort of 'pacific penetration'?

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